

No. 12782

United States
Court of Appeals
for the Ninth Circuit.

CONTROLLER OF THE STATE OF CALI-
FORNIA,

Appellant,

VS.

ARLIE R. LOCKWOOD, Bankrupt,

Appellee.

Transcript of Record

Appeal from the District Court of the United States
Southern District of California,
Central Division.

FILED

MAY 1 1957

PAUL H. O'BRIEN.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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For Appellee:

DECHTER, HOYT, PINES & WALSH,
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Los Angeles 13, Calif.

In the District Court of the United States for the
Southern District of California, Central Division

In Bankruptcy No. 44536-B

In the Matter of:

ARLIE R. LOCKWOOD,

Debtor.

PETITION UNDER CHAPTER XI (SECTION
322) OF THE BANKRUPTCY ACT

To the Honorable Judges of the Above-Entitled
Court:

The verified petition of Arlie R. Lockwood respectfully represents to the Court as follows:

I.

That your petitioner is now and at all times herein mentioned has been a resident of the State of California, County of Los Angeles, residing at 11930 Longvale Street, Lynwood, California, and has been engaged in and conducting an oil business at 8132 Atlantic Boulevard, Bell, California, and is a person entitled to become a bankrupt under the Acts of Congress relating to bankruptcy.

II.

That your petitioner has been operating a business at 8132 Atlantic Boulevard. Said business consists of the purchase of petroleum products and the sale of said products to third parties; that your petitioner has motor equipment used to effect de-

livery of said products, and has a plant and equipment for storage located upon real property leased from the Elco Oil Corporation or E. J. [2*] Lindeman. That said business is operating at a monthly profit of \$1,000.00 per month; that your petitioner's fixed overhead consists of weekly payroll of \$265.00, rent of \$150.00 per month, and your petitioner's drawing account of \$125.00 per week plus travelling expenses; that in addition, your petitioner has miscellaneous expenses of repair and maintenance of his equipment. Your petitioner represents that if permitted to remain in possession of his assets and carry on his business under the supervision of the above-entitled court, that your petitioner's operations will show approximately \$1,000.00 per month net operating profit.

III.

That no bankruptcy proceeding has heretofore been filed by your petitioner, and no involuntary petition in bankruptcy is now pending against him. That your petitioner is unable to pay his debts as they mature, and proposes the arrangement hereinafter set forth with his unsecured creditors.

IV.

That your petitioner alleges, as required by Section 324, Chapter 11 of the Bankruptcy Act, as amended:

(a) That your petitioner has no executory contracts except that your petitioner rents on a month-to-month basis the premises occupied by your petitioner, and that your petitioner has leases cover-

ing two service stations which have heretofore been subleased to the Elm Oil Company, which company is paying the rent direct to the lessors under said leases.

(b) That a statement of affairs of your petitioner will be filed within the time directed by the above-entitled Court.

(c) That the Clerk's filing fee will be paid upon the filing of this petition.

(d) That your petitioner's assets are located at 8132 Atlantic Boulevard and such other places as shown in the schedules on file herein. [3]

V.

That your petitioner's present difficulty has arisen by a proposed assessment by the State Board of Equalization whereby said Board has wrongfully claimed that your petitioner has sold gasoline without collecting and paying a tax thereon, which claim is disputed by your petitioner; but the said Board proposes to levy an assessment of \$27,000.00 in the form of a jeopardy assessment. That your petitioner is obligated to the other creditors as shown in the schedules, which creditors are current and are still selling products to your petitioner; but if said proposed jeopardy assessment is levied, it would be impossible for your petitioner to pay the same and litigate the validity thereof, and the same would prevent your petitioner's satisfying the claims of unsecured creditors or carrying on its business and preserving the good will not possessed by your petitioner in respect thereto.

VI.

That attached hereto are schedules required to be filed under the general orders of the Bankruptcy Act, which contain information as accurate as your petitioner is able to present at this time pending an up-to-date audit of petitioner's books, and will request the above-entitled Court to file amended schedules if and when it appears that the attached schedules are in error.

Debtor's Proposed Plan of Arrangement

That your petitioner proposes the following plan of arrangement:

Article 1. That the creditors of petitioner be divided into classes and that the proposed classes be as follows:

Class A. Expenses of operation under plan of arrangements as may be allowed and ordered paid.

Class B. Expenses of administration that may be allowed and ordered paid.

Class C. All creditors entitled to priority as provided [4] in Section 64a, subdivisions 2, 4 and 5 of the Acts of Congress relating to Bankruptcy, as amended.

Class D. Obligations as they mature to secured creditors in accordance with the terms of their contracts.

Class E. To pay pro-rata, at such times as this Honorable Court may direct and at intervals not to exceed six months, dividends upon unsecured creditors' claims until said claims are paid in full.

Article II. That said plan of arrangement be carried out by permitting the debtor to remain in possession of his assets with the right to carry on his business of purchasing and selling petroleum products.

Article III. That petitioner be permitted to make payments from time to time when funds are available in accordance with this plan of arrangement and that petitioner be given an extension of time within which to complete this arrangement and to discharge all of the creditors' claims as provided in this arrangement.

Article IV. That petitioner be permitted to remain in possession of his assets and continue operating subject to the supervision and direction of the above-entitled Court, with the authority to employ workmen and the necessary labor as may be required, including the right to incur obligations as may be authorized and permitted from time to time by the above-entitled Court, and to secure said obligations if required so to do as may be ordered and directed by the above-entitled Court.

Article V. All debts incurred after the filing of this petition prior to the confirmation of the plan of arrangement shall be paid in full and in such manner as ordered by the above-entitled Court.

Article VI. The Court shall retain jurisdiction of the debtor's property and the operation of same until the payment in full of all creditors' claims and this Honorable Court be authorized, [5] in its

discretion, to countersign all checks signed by the debtor in possession.

Article VII. In the event any claim is in controversy in respect to classification or the amount due, the debtor, under order of the Court, may make such deposit in such manner as the Court may direct in respect to said disputed claim and proceed to pay other creditors and be restored to possession pending a final determination of said disputed claim.

XI.

That your petitioner is advised that Chapter XI of the Bankruptcy Act is the appropriate section of the Act under which to seek relief and that your petitioner verily believes that if his business can be operated in the manner herein designated and if permitted to continue to operate as proposed in this petition, your petitioner can pay all his just debts in full.

That it is necessary for the speedy and proper administration of the debtor's affairs and the equitable payment of creditors, that all creditors and parties be enjoined from commencing or prosecuting any suit or foreclosure proceeding in any form or manner other than before the above-entitled Court or without permission of the above-entitled Court.

Wherefore, your petitioner prays that proceedings may be had upon this petition in accordance with the provisions of Chapter XI of the Bankruptcy Act as amended. That all creditors and other

parties be enjoined from commencing any suit in any Court or conducting any sale or foreclosure proceedings affecting the property of the petitioner or repossessing any property without order of this Honorable Court first had and obtained. That this Honorable Court leave the debtor in possession, with full authority to operate and carry on the debtor's business affairs pending a confirmation of the debtor's proposed plan of arrangement and that an adjudication be stayed. That this Honorable Court require debtor [6] to open the necessary bank account or accounts for the purpose of properly conducting the business and that the funds may be withdrawn upon the signature and countersignature as this Honorable Court may direct and to take such other steps and make such other orders herein as may be necessary for the protection of the debtor and all interested parties, and that your petitioner be granted such other and further relief as is just and proper in the premises.

/s/ ARLIE R. LOCKWOOD.

PAUL MAGASIN, and

COBB & UTLEY,

By /s/ FRANCIS B. COBB,

Attorneys for Debtor.

State of California,
County of Los Angeles—ss.

I, Arlie R. Lockwood, the petitioning debtor mentioned and described in the foregoing petition, here-

by make solemn oath that the statements contained therein are true according to the best of my knowledge, information and belief.

/s/ ARLIE R. LOCKWOOD.

Subscribed and sworn to before me this 30th day of August, 1946.

[Seal] /s/ BLANCH MORRIS,
Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires July 22, 1947.

[Endorsed]: Filed August 30, 1946. [7]

[Title of District Court and Cause.]

APPROVAL OF DEBTOR'S PETITION AND
ORDER OF REFERENCE UNDER SECTION 322 OF THE BANKRUPTCY ACT

At Los Angeles, in said District, on August 30, 1946, before the said Court the petition of Arlie R. Lockwood that he desires to obtain relief under Section 322 of the Bankruptcy Act, and within the true intent and meaning of all the Acts of Congress relating to bankruptcy, having been heard and duly considered, the said petition is hereby approved accordingly.

It is thereupon ordered that said matter be referred to Hugh L. Dickson, Esq., one of the referees in bankruptcy of this Court, to take such further proceedings therein as are required by said Acts; and

that the said Arlie R. Lockwood shall attend before said referee on Sept. 6, 1946, and at such times as said referee shall designate, at his office in Los Angeles, California, and shall submit to such orders as may be made by said referee or by this Court relating to said matter.

Witness, the Honorable Ben Harrison, Judge of said Court, and the seal thereof, at Los Angeles, in said District, on August 30, 1946.

[Seal] EDMUND L. SMITH,
Clerk.

By /s/ F. BETZ,
Deputy Clerk.

[Endorsed]: Filed August 30, 1946. [8]

[Title of District Court and Cause.]

REFEREE'S CERTIFICATE ON REVIEW

To the Honorable Campbell Beaumont, Judge of the United States District Court in and for the Southern District of California, Central Division:

I, Hugh L. Dickson, Referee in Bankruptcy to whom the proceedings in this matter were referred, do hereby certify:

That on or about October 3, 1946, the Controller of the State of California duly filed a claim in the above-entitled bankruptcy proceedings on behalf of the State of California, asserting thereby that

there was due and owing the State of California from and by said Arlie R. Lockwood, motor vehicle fuel license taxes in the sum of \$29,280.85. The original of said claim is attached hereto and made a part hereof.

That on or about October 10, 1946, the above-named debtor and E. A. Lynch, as Receiver for his estate, filed written objections to the allowance of said claim. The original of said objections is attached hereto and made a part hereof.

That on or about October 17, 1946, the Controller of the State of California, with the consent of the court, filed an amended proof of priority claim for taxes in the above-entitled bankruptcy proceedings on behalf of the State of [9] California, asserting thereby that there was due and owing the State of California from and by said Arlie R. Lockwood, motor vehicle fuel license taxes in the sum of \$31,-017.47, plus additional interest amounting to \$71.42 for each month and every month or fraction thereof commencing November 1, 1946, to date of payment. The original of said claim is attached hereto and made a part hereof.

That on or about October 22, 1946, the above-named debtor and E. A. Lynch, as Receiver for his estate, duly filed an objection to the allowance of said amended claim and for ground of objection alleged that the above-named debtor is not indebted to the Controller of the State of California for any sum or amount, and particularly is not indebted for any of the items or alleged taxes set forth in said

amended claim; that the above-named debtor has not sold or distributed gasoline during the months of January, May, June, July and September, 1945, or April and May, 1946, on which a tax has not been paid and that all the gasoline sold by the debtor was gasoline on which the motor vehicle fuel license tax had been paid to the State of California; that said jeopardy determination was made upon suspicion and without a factual or a legal basis for the making of the same; that penalties of \$14,284.08 and \$1,428.42 set forth in said amended claim may not properly be claimed against the above-entitled estate; that no interest is due with respect to said amended claim on the ground that no sum is due upon which interest may be computed; that the claim does not contain a sufficient itemization of the transactions forming the basis for the assessment of said taxes. The original of said objection it attached hereto and made a part hereof.

That the objections of the above-named debtor and E. A. Lynch, as Receiver for said debtor, to said amended claim of the [10] State of California heretofore filed herein on October 22, 1946, by the Controller of the State of California came on regularly for hearing on the 22nd and 28th days of October, and the 1st and 27th days of November, 1946, Paul Magasin and Cobb and Utley, Esqs., appearing as attorneys for said debtor, Dechter, Hoyt, Pines & Walsh, by Harry A. Pines, appearing as attorneys for said Receiver, and Robert W. Kenny, Attorney General of the State of California and Daniel N. Stevens, Deputy Attorney General of

the State of California, appearing as attorneys for the Controller of the State of California, and oral and documentary evidence having been introduced on behalf of all of said parties and the court having considered the same and heard the arguments of counsel and being fully advised, on January 16, 1947, your Referee made, signed and filed an Order in which he found that each of said objections to said amended claim is not sustained by the proof and that said amended claim was supported in its entirety by the testimony at said hearing, and was, therefore, duly approved and ordered that said objections be overruled and said amended claim allowed as a prior lien claim for taxes in the sum of \$31,212.08, together with additional interest amounting to \$71.54 for each and every month or fraction thereof after December 31, 1946, to date of payment. The original of said Order is attached hereto and made a part hereof.

That on January 21, 1947, said Receiver filed his petition for instructions as to whether he should file a petition for review of said order. The original of said petition is attached hereto and made a part hereof.

That on January 21, 1947, your Referee made, signed and filed an Order instructing said Receiver not to file a petition for review of said Order of January 16, 1947. The original of said Order is attached hereto and made a part hereof. [11]

That on January 25, 1947, the above-named debtor filed his petition for review of said order of January 16, 1947, and requesting that your Referee prepare

his Certificate on Review and add thereto the claim of the Controller of the State of California and amendments thereto and exhibits attached thereto; the objections by the debtor and Receiver to said claim and amendments thereto; all exhibits offered and received at the hearing on said objections to said claim; the reporter's transcript of proceedings had upon the hearing of the objections to said claim; the order allowing said claim after hearing said objections thereto; the Receiver's petition for instructions and order thereon; and the debtor's petition for review. The original of said petition is attached hereto and made a part hereof.

That because of the extended period of time and the number of days on which testimony was given at the hearing upon the debtor's objections to said amended claim of the Controller of the State of California, your Referee is unable to prepare a narrative statement of the evidence without a reporter's transcript of said proceedings; that no reporter's transcript of said proceedings has been furnished your Referee for this purpose.

That on July 10, 1947, the Controller of the State of California filed a petition for an Order to Show Cause, reciting that the attorneys for the Controller of the State of California have requested the attorneys for said debtor on numerous occasions to pay the fee necessary for the preparation of said reporter's transcript but said attorneys for said debtor have neglected and failed to pay the necessary fee for the preparation of said transcript and that approximately six months have elapsed since

the filing of the petition for review by said debtor and praying that an Order to Show Cause issue out of the above-entitled Court directing the above-named debtor to appear at a time and place [12] certain to show cause, if any he has, why he has failed to have prepared the reporter's transcript of the hearing on objections to said amended claim of the Controller of the State of California and why said Referee should not prepare his certificate on review including therein only the claim of the Controller of the State of California and amendments thereto; objections by the debtor and receiver to said claim and amendments thereto; the order of January 16, 1947, allowing said claim after hearing objections thereto; the petition of the receiver for instructions and order thereon; and the debtor's petition for review of said order of January 16, 1947. The original of said petition is attached hereto and made a part hereof.

On July 10, 1947, pursuant to the petition of the Controller of the State of California, your Referee made, signed and filed an Order that Arlie R. Lockwood, the debtor herein be and appear before the undersigned Referee in Room 343 Federal Building, Los Angeles 12, California, on the 17th day of July, 1947, at the hour of 10:00 a.m., then and there to show cause, if any he has, why said Referee should not prepare his certificate on review of the order of January 16, 1947, allowing the claim of the Controller of the State of California after hearing objections thereto, without including therein or attaching thereto a reporter's transcript of the pro-

ceedings had upon the hearing of said objections to said claim and why said Referee should not include therein only the claim of the Controller of the State of California and amendments thereto and exhibits attached thereto; the objections by the debtor and receiver to said claim and amendments thereto; the order allowing claim after hearing objections thereto; the receiver's petition for instructions and order thereon; and said debtor's petition for review. The original of said Order is attached hereto and made a part hereof. [13]

That on July 17, 1947, at the time and place specified in said Order to Show Cause of July 10, 1947, no appearance was made by or on behalf of the above-named debtor and your Referee ordered that the petition of the Controller be granted and that his certificate on review of the Order of January 16, 1947, be prepared without a narrative statement of facts and without the reporter's transcript of the hearing on the objections of said debtor and said Receiver to said amended claim of the Controller of the State of California, and including therein only the claim of the Controller of the State of California and amendments thereto; objections by the debtor and Receiver to said claim and amendments thereto; the Order of January 16, 1947, allowing said claims after hearing objections thereto; the petition of the Receiver for instructions and order thereon and the debtor's petition for review of said Order of January 16, 1947. The original of said Order is attached hereto and made a part hereof.

Your Referee submits herewith the following:

1. Claim for motor vehicle fuel license taxes in the sum of \$29,280.85 (October 4, 1946).
2. Objection to Claim of Controller of the State of California (October 11, 1946).
3. Amended Proof of Priority Claim for Taxes (October 17, 1946).
4. Objection to Amended Claim of Controller of the State of California (October 22, 1946).
5. Order Allowing Claim after Hearing Objections Thereto (January 16, 1947).
6. Petition for Instructions (January 20, 1947).
7. Order Instructing Receiver not to file Petition for Review or Order of January 16, 1947 (January 21, 1947).
8. Debtor's Petition for Review of Referee's Order [14] Allowing Claim after Hearing Objections Thereto (January 25, 1947).
9. Petition of the Controller of the State of California for Order to Show Cause Re Omission of Narrative Statement of Evidence and Reporter's Transcript from Referee's Certificate on Review (July 10, 1947).
10. Order to Show Cause (July 10, 1947).
11. Order Re Omission of Narrative Statement

of Evidence and Reporter's Transcript from
Referee's Certificate on Review (July 17, 1947).

Dated: November 3, 1947.

/s/ HUGH L. DICKSON,
Referee in Bankruptcy.

[Endorsed]: Filed Nov. 4, 1947. [15]

State of California
Office of the Controller
Sacramento

October 3, 1946

Honorable H. L. Dickson
Referee in Bankruptcy
3rd Floor, Federal Bldg.
Temple and Spring Sts.
Los Angeles 12, Calif.

Re: Arlie R. Lockwood
Bankruptcy No. 44536B

Dear Sir:

We are enclosing herewith Proof of Priority Claim for taxes due the State of California under the Motor Vehicle Fuel License Tax Law. Said claim has been duly signed and sworn to and we trust that you will file the same in order that it may be given attention at the proper time.

Attached to said claim you will find an itemized statement of the amount now due submitted as Exhibit A. The total now due including accrued penalty and interest is \$29,280.85. Please under-

stand that the taxes due in this case are subject to interest at the rate of $\frac{1}{2}$ of 1% per month or fraction thereof from due date to date of payment. Our claim includes interest to November 1, 1946, subsequent to which date interest will accrue in the amount of \$67.35 for each month or fraction thereof.

When drawing check in payment of this claim, kindly make the same payable to Thomas H. Kuchel, State Controller, and forward the same direct to him at Sacramento, attention the writer.

Very truly yours,

THOMAS H. KUCHEL,
Controller.

By /s/ L. A. McKEE.

LAM:vs

Enc.

In the District Court of the United States in and for
the Southern District of California, Central
Division

No. 44536B in Bankruptcy

In the Matter of
ARLIE R. LOCKWOOD,

Debtor.

PROOF OF PRIORITY CLAIM FOR TAXES

Account No. B-1385

On the 3rd day of October, 1946, came Bert Foster, and made oath and said that he is a Deputy

Controller of the State of California, and as such he is qualified and empowered to make this claim on behalf of the State of California;

That he is informed and believes that the said Arlie R. Lockwood, debtor, was, at or before the filing of the petition in the above-entitled matter, and is now justly and truly indebted to the State of California in the sum of \$29,280.85, plus additional interest amounting to \$67.35 for each and every month or fraction thereof commencing November 1, 1946;

That the consideration of the debt is a tax duly levied and assessed under the provisions of the "Motor Vehicle Fuel License Tax Law" (Sections 7301-8403 Revenue & Taxation Code, State of California) with penalties and interest; that attached hereto and marked "Exhibit A" is an itemized statement showing the amount of tax, penalties and interest which have accrued, and the amount of interest which will hereafter accrue; [17]

That this claim is entitled to the priority provided by Section 64-a of the Bankruptcy Act;

That the due date for said tax is past; that no part of said tax, interest or penalty has been paid; that there are no set-offs or counter claims to the same; that no note or judgment has been recovered therefor; that deponent has not, nor has any person, to his knowledge or belief, for the use or benefit of the State of California, had or received any manner of security for the said tax, penalties or interest whatever, Except the lien which attached

pursuant to law (Sec. 7871, Revenue and Taxation Code).

[Seal] /s/ BERT FOSTER,

Deputy Controller of the
State of California.

Subscribed and sworn to before me this 3rd day
of October, 1946.

/s/ L. A. McKEE,

Chief, Division of Tax
Collection. [18]

Exhibit A

Arlie R. Lockwood
8132 Atlantic Blvd.
Bell, California

You are hereby notified of an amount of tax, interest and penalty due from you as follows:

Month and Year	Additional of Gallons Distributed	No.	Amt. of Tax	Penalty Amt.	Interest to 9/1/46 No. Mos.	Amount
1/45	4,349		\$ 130.47	\$ 130.47	(18)	\$ 11.74
5/45	71,496		2,144.88	2,144.88	(14)	150.14
6/45	216,539		6,496.17	6,496.17	(13)	422.25
7/45	138,805		4,164.15	4,164.15	(12)	249.85
9/45	17,787		533.61	533.61	(10)	26.68
	<u>448,976</u>		<u>\$13,469.28</u>	<u>\$13,469.28</u>		<u>\$860.66</u>
Total of This Determination.....						\$27,799.22
10% Penalty accrued September 5, 1946, pursuant to Section 7660 of the Revenue and Taxation Code, Div. 2, Part 2.....						1,346.93
Accrued Interest to November 1, 1946.....						134.70
						<u>\$29,280.85</u>

To levy and assess the Motor Vehicle Fuel License Tax on the above gallonage considered as illegal distributions of Motor Vehicle Fuel pursuant to audits of your books and records as conducted by the staff of the Los Angeles office of this Board.

This Is a Jeopardy Determination Levied Pursuant to Section 7727 and 7728 of the Revenue and Taxation Code, Division 2, Part 2.

[Endorsed]: Filed October 4, 1946. [19]

[Title District Court and Cause.]

NOTICE OF HEARING ON OBJECTION
TO CLAIM

To: The Controller of the State of California; and
L. A. McKee, Chief, Division of Tax Collection.

You and Each of You Will Please Take Notice that Arlie R. Lockwood, debtor, and E. A. Lynch, as Receiver for his estate, has filed their written objections to your claim against the above-entitled estate, a copy of which objections is attached hereto.

You are further notified that the hearing will be had upon said objections before Hugh L. Dickson, Referee in Bankruptcy, at the courtroom of said Referee in the Federal Building, Los Angeles, California, on October 17, 1946, at the hour of 2:00 p.m., or as soon thereafter as counsel may be heard.

Dated: October 10, 1946.

PAUL MAGASIN and
COBB & UTLEY

By /s/ ERNEST R. UTLEY,
Counsel for Debtor. [21]

[Title of District Court and Cause.]

OBJECTION TO CLAIM OF CONTROLLER
OF THE STATE OF CALIFORNIA

Come now the above-named Debtor and E. A. Lynch, Receiver for the above-named Debtor, and object to the claim of the Controller of the State of California being dated October the 3d, 1946, in the amount of \$29,280.85, and for ground of objection set forth:

I.

That the above-named debtor is not indebted to the Controller of the State of California for any sum or amount, and is particularly not indebted for any of the items or alleged taxes set forth in Exhibit "A" attached to said claim.

II.

That the above-named debtor has not sold or distributed gasoline during the months as set forth in Exhibit "A" on which a tax has not been paid, and alleges the true facts to be that all the said gasoline sold by the Debtor was gasoline on which the motor vehicle fuel tax has been paid to the State of California.

III.

That said jeopardy determination alleged to have been [22] made pursuant to Section 7727 and 7728 of the Revenue and Taxation Code of the State of California was made upon suspicion and without a factual or legal basis for the making of the same.

Wherefore, your objectors pray that a hearing be had and that it be adjudged and determined that the above-entitled debtor and his estate are not liable to the Controller of the State of California for any sum or amount for taxes, interest or penalties as is claimed or asserted by reason of the claim on file herein.

Dated this 10th day of October, 1946.

/s/ ARLIE R. LOCKWOOD,
Debtor.

/s/ E. A. LYNCH,
Receiver.

State of California,
County of Los Angeles—ss.

I, Arlie R. Lockwood, the debtor mentioned and described in the foregoing objection, hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information and belief.

/s/ ARLIE R. LOCKWOOD.

Subscribed and sworn to before me this 10th day of October, 1946.

[Seal] /s/ BLANCHE MORRIS,
Notary Public in and for the County of Los Angeles, State of California.

Affidavit of service by mail attached.

[Endorsed]: Filed October 11, 1946. [23]

[Title of District Court and Cause.]

AMENDED PROOF OF PRIORITY
CLAIM FOR TAXES

On the sixteenth day of October, 1946, came Ewing Hass, and made oath and said that he is a Deputy Controller of the State of California, and as such he is qualified and empowered to make this claim on behalf of the State of California;

That he is informed and believes that the said Arlie R. Lockwood, debtor, was, at or before the filing of the petition in the above-entitled matter, and is now justly and truly indebted to the State of California in the sum of \$31,017.47, plus additional interest amounting to \$71.42 for each and every month or fraction thereof commencing November 1, 1946;

That the consideration of the debt is a tax duly levied and assessed under the provisions of the "Motor Vehicle Fuel License Tax Law" (Sections 7301-8403 Revenue & Taxation Code, State of California) with penalties and interest; that attached hereto and marked "Exhibit A" is an itemized statement showing the amount of tax, penalties and interest which have accrued, and the amount of interest which will hereafter accrue;

That also attached hereto and marked "Exhibit B," "Exhibit C," "Exhibit D," and "Exhibit E," are copies of the notices of determination, [25] which determinations were heretofore duly made pursuant to law, and copies of which notices were heretofore duly mailed to said debtor; that said

“Exhibit B” was the basis of the original proof of debt filed herein; that this amended proof of debt includes in addition the amounts found to be due in “Exhibit C,” “Exhibit D,” and “Exhibit E;” that said “Exhibit A” is a combined statement showing tax, penalties and interest due under all four Notices of Determination;

That this claim is entitled to the priority provided by Section 64-a of the Bankruptcy Act;

That the due date for said tax is past; that no part of said tax, interest or penalty has been paid; that there are no set-offs or counterclaims to the same; that no note or judgment has been recovered therefor; that deponent has not, nor has any person, to his knowledge or belief, for the use or benefit of the State of California, had or received any manner of security for the said tax, penalties or interest whatever, Except the lien which attached pursuant to law (Sec. 7871, Revenue and Taxation Code).

[Seal] /s/ EWING HASS,
Deputy Controller of the
State of California.

Subscribed and sworn to before me this sixteenth day of October, 1946.

/s/ L. A. McKEE,
Chief, Division of Tax
Collection. [26]

"Exhibit A"

Arlie R. Lockwood
8132 Atlantic Blvd.
Bell, California

Mo. and Year	Tax	100% Pen.	10% Pen.	Interest to 10/31/46	Total
1/45	\$ 154.47	\$ 154.47	\$ 15.45	\$ 15.45	\$ 339.84
5/45	2,194.68	2,194.68	219.47	175.57	4,784.40
6/45	6,496.17	6,496.17	649.62	487.21	14,129.17
7/45	4,187.91	4,187.91	418.80	293.15	9,087.77
9/45	533.61	533.61	53.36	32.02	1,152.60
4/46	629.64	629.64	62.96	15.74	1,337.98
5/46	87.60	87.60	8.76	1.75	185.71
	<hr/>	<hr/>	<hr/>	<hr/>	<hr/>
	\$14,284.08	\$14,284.08	\$1,428.42	\$1,020.89	\$31,017.47

Interest of \$71.42 will accrue each month or fraction thereof subsequent to October 31, 1946.

Recapitulation

Total Tax	\$14,284.08
100% Penalty	14,284.08
10% Penalty	1,428.42
Interest to Oct. 1, 1946	1,020.89
	<hr/>
Total.....	\$31,017.47

Make remittance payable to State Controller and mail with enclosed pink copy to State Board of Equalization, Sacramento, California.

Office of
State Board of Equalization
State of California
Sacramento

License No. B-1385
Date August 6, 1946

Penalty

Amounting to \$1,346.93 in addition to any shown below must be added after Sept. 5, 1946 if the amount of this notice is not paid on or before that date.

Notice of Determination—Motor Vehicle Fuel License Tax

Additional Interest

Arlie R. Lockwood
8132 Atlantic Blvd.
Bell, California

Amounting to \$67.35 must be added for each month or fraction thereof after Sept. 1, 1946, if the amount of this notice is not paid on or before that date.

You are hereby notified of an amount of tax, interest and penalty due from you as follows:

Mo. & Year	Additional No. of Gals. Distributed	Amt. of Tax	Rate	Penalty	Amount	No. of Mos.	Interest to 9-1-46	Total of This Determination
1/45	4,349	\$ 130.47		\$	130.47	(18)	\$ 11.74	\$ 272.68
5/45	71,496	2,144.88			2,144.88	(14)	150.14	4,439.90
6/45	216,539	6,496.17			6,496.17	(13)	422.25	13,414.59
7/45	138,805	4,164.15			4,164.15	(12)	249.85	8,578.15
9/45	17,787	533.61			533.61	(10)	26.68	1,093.90
	448,976	\$13,469.28			\$13,469.28		\$860.66	\$27,799.22

To levy and assess the Motor Vehicle Fuel License Tax on the above gallonage considered as illegal distributions of motor vehicle fuel pursuant to audits of your books and records as conducted by the staff of the Los Angeles office of this Board.

This Is a Jeopardy Determination Levied Pursuant to Section 7727 and 7728 of the Revenue and Taxation Code, Division 2, Part 2.

Headquarters Office Copy No. 1

"Exhibit C"

Make remittance payable to State Controller and mail with enclosed pink copy to State Board of Equalization, Sacramento, California.

Office of
State Board of Equalization
State of California
Sacramento

License No. B-1324

Date August 6, 1946

Penalty

Amounting to \$7.38 in addition to any shown below must be added after Oct. 18, 1946 if the amount of this notice is not paid on or before that date.

Notice of Determination—Motor Vehicle Fuel License Tax

Additional Interest

Amounting to \$0.37 must be added for each month or fraction thereof after Sept. 1, 1946, if the amount of this notice is not paid on or before that date.

Archie R. Lockwood
Dependable Oil Company
8132 Atlantic Avenue
Bell, California

*** Copy ***

You are hereby notified of an amount of tax, interest and penalty due from you as follows:

Mo. & Year	Additional No. of Gals. Distributed	Amt. of Tax	Penalty		Total of This Determination
			Amount	No. of Mos.	
1/45	800	\$24.00	\$24.00	(18)	\$2.16
5/45	1,660	49.80	49.80	(14)	3.49
	2,460	\$73.80	\$73.80		\$5.65
					\$153.25

To levy and assess the Motor Vehicle Fuel License Tax on the above gallonage considered as illegal distributions of motor vehicle fuel pursuant to audits of your books and records as conducted by the staff of the Los Angeles office of this Board.

This Is a Jeopardy Determination Levied Pursuant to Section 7727 and 7728 of the Revenue and Taxation Code, Division 2, Part 2.

State Board of Equalization

/s/ DIXWELL L. PIERCE, Secretary.

Make remittance payable to State Controller and mail with enclosed pink copy to State Board of Equalization, Sacramento, California.

Office of
State Board of Equalization
State of California
Sacramento

License No. B-1324
Date August 6, 1946

Penalty
Amounting to \$2.38 in addition to any
shown below must be added after Oct. 18, 1946
if the amount of this notice is
not paid on or before that date.

Notice of Determination—Motor Vehicle Fuel License Tax

Additional Interest
Amounting to \$0.12 must be added for each
month or fraction thereof after Sept. 1, 1946,
if the amount of this notice is not paid on or
before that date.

Arlie R. Lockwood
Dependable Oil Company
8132 Atlantic Blvd.
Bell, California

*** Copy ***

You are hereby notified of an amount of tax, interest and penalty due from you as follows:

Mo. & Year	Additional No. of Gals. Distributed	Amt. of Tax	Rate	Penalty	No. of Mos.	Amount	Total of This Determination
7/45	792	\$23.76	100%		(12)	\$1.43	\$48.95

To levy and assess the Motor Vehicle Fuel License Tax on the above gallonage of kerosene illegally blended
with a tax paid product and distributed as motor vehicle fuel pursuant to audit of your books and records as con-
ducted by the staff of the Los Angeles office of this Board.

This Is a Jeopardy Determination Levied Pursuant to Section 7727 and 7728 of the Revenue
and Taxation Code, Division 2, Part 2.

Controller's Office Copy No. 1

"Exhibit E"

Make remittance payable to State Controller and mail with enclosed pink copy to State Board of Equalization, Sacramento, California.

Office of
State Board of Equalization
State of California
Sacramento

License No. B-1385

Date Oct. 1, 1946

Penalty
Amounting to \$71.72 in addition to any
shown below must be added after Oct. 18, 1946
if the amount of this notice is
not paid on or before that date.

Notice of Determination—Motor Vehicle Fuel License Tax

Additional Interest
Amounting to \$3.58 must be added for each
month or fraction thereof after Nov. 1, 1946,
if the amount of this notice is not paid on or
before that date.

Arlie R. Lockwood
Dependable Oil Company
8132 Atlantic Avenue
Bell, California

You are hereby notified of an amount of tax, interest and penalty due from you as follows:

Mo. & Year	Additional No. of Gals. Distributed	Amt. of Tax	Rate	Penalty		Total of This Determination
				No. of Mos.	Amount	
4/46	20,988	\$629.64	100%	(5)	\$15.74	
5/46	2,920	87.60	100%	(4)	1.75	
	23,908	\$717.24			\$17.49	\$1,451.97

To levy and assess the Motor Vehicle Fuel License Tax on the above gallonage considered as illegal distributions of motor vehicle fuel pursuant to audits of your books and records as conducted by the staff of the Los Angeles office of this Board.

This Is a Jeopardy Determination Levied Pursuant to Section 7727 and 7728 of the Revenue
and Taxation Code, Division 2, Part 2.

State Board of Equalization

/s/ DIXWELL L. PIERCE, Secretary.

Assessment Order

File Copy

[Title of District Court and Cause.]

OBJECTION TO AMENDED CLAIM OF CONTROLLER OF THE STATE OF CALIFORNIA

Come now the above-named Debtor and E. A. Lynch, Receiver for the above-named Debtor, and object to the claim of the Controller of the State of California being dated October the 15th, 1946, in the amount of \$31,017.47, and for ground of objection set forth:

I.

That the above-named debtor is not indebted to the Controller of the State of California for any sum or amount, and is particularly not indebted for any of the items or alleged taxes set forth in Exhibit "A," "B" and "C" attached to said claim.

II.

That the above-named debtor has not sold or distributed gasoline during the months as set forth in Exhibit "A" and "B" on which a tax has not been paid, and allege the true facts to be that all the said gasoline sold by the Debtor was gasoline on which the motor vehicle fuel tax has been paid to the State of California. [32]

III.

That said jeopardy determination alleged to have been made pursuant to Section 7727 and 7728 of the Revenue and Taxation Code of the State of California was made upon suspicion and without

a factual or legal basis for the making of the same.

IV.

Object to that portion of the claim for penalties in the amount of \$14,284.08 and \$1,428.42 on the ground that said penalties are not proper as claimed against the above-entitled estate.

V.

Further object to any interest in respect to said claim on the ground that no sum is due upon which interest may be computed.

VI.

Object to the claim on the ground that the same does not contain a sufficient itemization of the transactions forming the basis for the assessment of said taxes.

Wherefore, your objectors pray that a hearing be had and that it be adjudged and determined that the above-entitled debtor and his estate are not liable to the Controller of the State of California for any sum or amount for taxes, interest or penalties as is claimed or asserted by reason of the claim on file herein.

Dated this 22d day of October, 1946.

/s/ ARLIE R. LOCKWOOD,
Debtor.

/s/ E. A. LYNCH,
Receiver. [33]

State of California,
County of Los Angeles—ss.

I, Arlie R. Lockwood, the debtor mentioned and described in the foregoing objection, hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information and belief.

/s/ ARLIE R. LOCKWOOD.

Subscribed and sworn to before me this 22d day of October, 1946.

/s/ FRANCIS B. COBB,

Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]. Filed October 22, 1946. [34]

[Title of District Court and Cause.]

ORDER ALLOWING CLAIM AFTER HEARING OBJECTIONS THERETO

The objections of the above-named Debtor and E. A. Lynch, Receiver for said Debtor, to the amended claim of the State of California heretofore filed herein on October 17, 1946, by The Controller of the State of California, came on regularly for hearing on the 22nd and 28th days of October and the 1st and 27th days of November, 1946, Paul Magasin and Cobb & Utley, Esqu岸s, appearing as attorneys for said Debtor; Dechter, Hoyt, Pines & Walsh by Harry A. Pines appear-

ing as attorneys for said Receiver, and Robert W. Kenny, Attorney General of the State of California, and Daniel N. Stevens, Deputy Attorney General of the State of California, appearing as attorney for The Controller of the State of California, and oral and documentary evidence having been introduced on behalf of all of said parties, and the Court having considered the same and heard the arguments [35] of counsel and being fully advised, it is found that said objections are not sustained by the proof, and said claim otherwise having been duly examined and found in form duly proved,

It Is Ordered that said objections be, and they hereby are, overruled, and said claim is allowed as a prior lien claim for taxes in the sum of \$31,212.08, together with additional interest amounting to \$71.54 for each and every month or fraction thereof after December 31, 1946, to date of payment.

Jan. 16, 1947.

/s/ HUGH L. DICKSON,
Referee in Bankruptcy.

[Endorsed]: Filed December 20, 1946. [36]

[Title of District Court and Cause.]

PETITION FOR INSTRUCTIONS

To the Honorable Hugh L. Dickson, Referee in
Bankruptcy for the Above-Entitled Debtor
Estate:

The verified petition of E. A. Lynch respectfully
represents:

I.

That he is the duly appointed, qualified and act-
ing Receiver of the above-entitled debtor.

II.

That the proceeding herein is a Chapter XI
proceeding.

III.

That an order has been made in this proceeding
allowing the claim of the State of California for
alleged motor vehicle fuel taxes, interest and pen-
alties, aggregating the sum of approximately \$29,-
000.00. That your petitioner is informed that said
order was signed by the Referee in Bankruptcy
herein on January 16, 1947, and said order will
become final unless a review is taken therefrom on
January 27th, 1947.

IV.

Your petitioner is informed by his attorneys that
in the opinion of said attorneys, the allowance of
the claim aforesaid [38] constituted error; and that
if said order becomes final it will serve to make a
plan of arrangement impossible, and, in all prob-

ability, would leave nothing for the benefit of general creditors upon the adjudication of the debtor.

V.

Your petitioner is further informed that the debtor has certain assets consisting of leases, which carry forfeiture clauses in the event of bankruptcy, and that it would be of irreparable damage to general creditors for the debtor to be adjudicated prior to the final determination of the validity of the claim of the said State Board of Equalization of the State of California.

VI.

Your petitioner desires the instruction of the Court whether, in the event the debtor does not file a petition for review from the Court's order of January 16, 1947, such a petition for review should be filed by your petitioner.

Wherefore, your petitioner prays for an order of instructions instructing him whether to file a petition for review of the Court's order of January 16, 1947, and prosecute the same; or, in the alternative, whether your petitioner should take steps toward the adjudication of the debtor as a bankrupt.

/s/ E. A. LYNCH,
Petitioner.

DECHTER, HOYT, PINES &
WALSH,

By /s/ HARRY H. PINES,
Attorneys for Petitioner.

Duly verified.

[Endorsed]: Filed January 20, 1947. [39]

[Title of District Court and Cause.]

ORDER ON RECEIVER'S PETITION
FOR INSTRUCTIONS

Upon the reading and filing of the verified petition for instructions of E. A. Lynch, the Receiver herein, as to whether said Receiver should file a review from the Court's order of January 16, 1947, and it appearing to the Court that any review from such order should be prosecuted by the debtor, if at all; and it further appearing that it is in the best interests of this estate that the Receiver not file such a petition for review from said order;

It Is Ordered that the Receiver herein be and he is hereby instructed not to file a petition for review from the order of this Court dated January 16, 1947.

Dated this 21st day of January, 1947.

/s/ HUGH L. DICKSON,
Referee in Bankruptcy.

[Endorsed]: Filed January 21, 1947. [41]

[Title of District Court and Cause.]

PETITION FOR REVIEW OF REFEREE'S
ORDER ALLOWING CLAIM AFTER
HEARING OBJECTIONS THERETO.

To the Honorable Hugh L. Dickson, Referee in
Bankruptcy:

Comes now your petitioner, Arlie R. Lockwood, debtor in the above-entitled proceedings, and petitions for a review of an order made and entered on the 16th day of January, 1947, entitled "Order Allowing Claim After Hearing Objections Thereto" and respectfully shows:

I.

That your petitioner is the debtor in the above-entitled proceeding and that the claim allowed by said order materially affects your petitioner and that your petitioner desires to review the same as provided by law.

II.

That your petitioner is the debtor in possession and is an interested party to this proceeding and is affected by the said order allowing the claim of The Controller of the State of California. [42]

III.

That the above-entitled Court erred in not permitting E. A. Lynch, as receiver for the above-entitled estate, to review said order allowing the claim of The Controller of the State of California, where the receiver sought so to do and the estate

is affected by said order and is in possession of property of your petitioner, which should be used for the purpose of preparing a transcript and expenses of reviewing said order.

IV.

That the Referee erred in not making findings of fact in respect to the amounts and items claimed and asserted as constituting said claim of The Controller of the State of California where said findings were requested and are necessary to show the basis for the order sought to be reviewed herein.

V.

That the Referee erred in allowing said claims for the amount for which the same was filed herein and where admitted credits were due in respect to said claim.

VI.

The Referee erred in allowing said claim where there was no evidence showing that Arlie R. Lockwood was a distributor of gasoline under the Revenue and Tax Code of the State of California and the evidence was contrary thereto and showed that the above-named debtor was a broker.

VII.

The Court erred in allowing said claim based upon the sale of gasoline where the undisputed evidence showed that all taxes had been previously paid to the manufacturer and distributor of said gasoline.

VIII.

The Court erred in allowing said claim based upon a jeopardy determination made by the State Board of Equalization [43] which jeopardy determination had not become final at the time of the filing of the above-entitled proceedings and was not made upon any legal and competent evidence. No legal and competent evidence was offered showing that there was any sale by Lockwood as a distributor of gasoline.

IX.

The Court erred in allowing said claim, including a one hundred per cent penalty, being contrary to the Bankruptcy Act and said assessment of penalty not having been made prior to the filing of the petition herein and the jeopardy assessment not having become final at the time of the filing of the petition herein.

X.

The Court erred in receiving as evidence the testimony of an auditor of the State Board of Equalization, which audit was based upon certain delivery slips which were shown to have been duplicated by invoices and which were not entered and did not form a part of the records of the debtor.

XI.

The Court erred in finding that said claim was a prior claim for taxes in the sum of \$31,212.08, which sum included a fifty per cent penalty and which should be reduced by the elimination of said penalty.

XII.

The Court erred in not finding the type of business said Arlie R. Lockwood was engaged in and whether he was a broker or a distributor.

XIII.

The Court erred in disallowing said claim on the ground that the debtor had failed to sustain the burden of proof where the Court announced at the beginning of said case that the burden or proof was upon the claimant and the claimant acquiesced in said [44] ruling by assuming to undertake the burden of proving and establishing said claim.

Wherefore, petitioner feeling aggrieved because of the order heretofore referred to and the failure of the Referee to make findings of fact and conclusions of law, prays that said order be reviewed as provided by Section 39-c of the Bankruptcy Act, as amended.

That upon said review, said order be reversed and annulled and that petitioner be granted such appropriate and proper relief in the premises as is just and proper.

That the Referee prepare his certificate on review and add thereto the following:

1. Claim of The Controller of the State of California and amendments thereto and exhibits attached thereto.

2. Objections by the debtor and receiver to said claim and amendments thereto.

3. All exhibits offered and received in the above-entitled matter.

4. Reporter's transcript of proceedings had upon the hearing upon the said claim.

5. Order allowing claim after hearing objections thereto.

6. Petition for Instructions and Order Thereon.

7. This petition for review.

Respectfully submitted,

/s/ ARLIE R. LOCKWOOD,
Debtor,
Petitioner.

PAUL MAGASIN &
COBB & UTLEY,

By /s/ FRANCIS B. COBB,
Attorneys for Debtor.

State of California,
County of Los Angeles—ss.

I, Arlie R. Lockwood, the debtor mentioned and described in the foregoing Petition, hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information and belief.

/s/ ARLIE R. LOCKWOOD.

Subscribed and sworn to before me this 25th day of January, 1946.

[Seal] /s/ HELEN A. NELSON,
Notary Public in and for
Said County and State.

Affidavit of Service by Mail attached.

[Endorsed]: Filed January 25, 1947. [46]

[Title of District Court and Cause.]

PETITION FOR ORDER TO SHOW CAUSE

Comes now the Controller of the State of California by Fred N. Howser, Attorney General, and Daniel N. Stevens, Deputy Attorney General, and alleges:

I.

That on January 16, 1947, the Honorable Hugh L. Dickson, Referee in Bankruptcy, signed and filed his order overruling the objections of the above-named debtor to the amended claim of the State of California for Motor Vehicle Fuel License taxes heretofore filed herein on October 17, 1946, and allowing said claim as a prior lien claim for taxes in the sum of \$31,212.08, together with additional interest thereon amounting to \$71.54 for each and every month or fraction thereof after December 31, 1946, to date of payment.

II.

That on January 25, 1947, said debtor filed his petition for review of said order and requesting that the Referee prepare [48] his certificate on review and add thereto the claim of the Controller of the State of California and amendments thereto and exhibits attached thereto; the objections by the debtor and receiver to said claim and amendments thereto; all exhibits offered and received at the hearing on said objections to said claim; the reporter's transcript of proceedings had upon the hearing upon the hearing upon the said claim; the order allowing said claim after hearing said objections thereto; the receiver's petition for instructions and order thereon; and the debtor's petition for review.

III.

That the above-named Referee has stated that because of the extended period of time and the number of days on which testimony was given at the hearing upon the debtor's objections to said claim, he is unable to prepare a narrative statement of the evidence without a reporter's transcript of said proceedings.

IV.

That the attorneys for the Controller of the State of California have requested the attorneys for said debtor on numerous occasions to pay the fee necessary for the preparation of said reporter's transcript, but said attorneys for said debtor have neglected and failed to pay the necessary fee for the

preparation of said transcript; that approximately six months have elapsed since the filing of the petition for review by said debtor.

V.

If said claim of the Controller of the State of California is a valid one, no plan of arrangement will be possible in this proceeding inasmuch as expenses of administration and said claim will exceed the total value of the debtor's assets; that no further proceedings in connection with said Chapter XI proceedings are practicable until a final determination is made of the [49] validity of said referee's order of January 16, 1947.

Wherefore, your Petitioner prays:

That an Order to Show Cause issue out of the above-entitled Court directing the above-named debtor to appear at a time and place certain to show cause, if any he has, why he has failed to have prepared the reporter's transcript of the hearing on objections to said amended claim of the Controller of the State of California and why said Referee should not prepare his certificate on review including therein only the claim of the Controller of the State of California and amendments thereto; objections by the debtor and receiver to said claim and amendments thereto; the order of January 16, 1947, allowing said claim after hearing objections thereto; the petition of the receiver for instructions and order thereon; and the debtor's

petition for review of said order of January 16, 1947.

THE CONTROLLER OF THE
STATE OF CALIFORNIA,

By /s/ FRED N. HOWSER,
Attorney General.

/s/ DANIEL N. STEVENS,
Deputy Attorney General, Attorneys for Said
Claimant. [50]

State of California,
County of Los Angeles—ss.

Daniel N. Stevens, being by me first duly sworn, deposes and says that he is one of the attorneys for the Claimant, State of California, in the foregoing and above-entitled action; that he has read the foregoing Petition for Order to Show Cause and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

/s/ DANIEL N. STEVENS.

Subscribed and sworn to before me this 10th day of July, 1947.

/s/ ELSIE A. GOODYE,
Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires April 18, 1949.

[Endorsed]: Filed July 10, 1947. [51]

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

Upon reading and filing the verified Petition of the Controller of the State of California by Fred N. Howser, Attorney General of the State of California, and Daniel N. Stevens, Deputy Attorney General, and good cause appearing therefor,

It Is Hereby Ordered that Arlie R. Lockwood, the debtor herein be and appear before the undersigned Referee in Room 343 Federal Building, Los Angeles 12, California, on the 17th day of July, 1947, at the hour of 10:00 a.m., then and there to show cause, if any he has, why said Referee should not prepare his certificate on review of the order of January 16, 1947, allowing the claim of the Controller of the State of California after hearing objections thereto, without including therein or attaching thereto a reporter's transcript of the proceedings had upon the hearing of said objections to said claim and why said Referee should not include therein only the claim of the Controller of the State of California and amendments thereto and exhibits [52] attached thereto; the objections by the debtor and receiver to said claim and amendments thereto; the order allowing claim after hearing objections thereto; the receiver's petition for instructions and order thereon; and said debtor's petition for review.

It Is Further Ordered that service of this order may be made by depositing a copy of said order

in the United States Post Office, postage prepaid, and addressed to Paul Magasin and Cobb & Utley, 639 South Spring Street, Los Angeles 14, California, attorneys for the above-named debtor.

Dated at Los Angeles, California, July 10, 1947.

/s/ HUGH L. DICKSON,
Referee in Bankruptcy.

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 10, 1947. [53]

[Title of District Court and Cause.]

ORDER RE OMISSION OF NARRATIVE
STATEMENT OF EVIDENCE AND RE-
PORTER'S TRANSCRIPT FROM REF-
EREE'S CERTIFICATE ON REVIEW

An Order having heretofore been issued on the 10th day of July, 1947, upon the petition of the Controller of the State of California, requiring Arlie R. Lockwood, the above-named debtor, to appear before the above-entitled court in the Courtroom of the Honorable Hugh L. Dickson, Referee in Bankruptcy, on the 17th day of July, 1947, at 10:00 a.m. and then and there to show cause, if any he has, why said Referee should not prepare his Certificate on Review of the Order of January 16, 1947, allowing the claim of the Controller of the State of California after hearing objections thereto without including therein or attaching thereto a reporter's transcript of the proceedings

had upon the hearing of said objections to said claim, and why said Referee should not include therein only the claim of the Controller of the State of California and amendments thereto and exhibits attached thereto; the objections by the debtor and receiver to said claim and amendments thereto; the Order allowing claim after hearing objections thereto; the receiver's petition for instructions and order thereon; and said [56] debtor's petition for review; said matter came on for hearing on May 22, 1947, at 10:00 a.m. before the Honorable Hugh L. Dickson, Referee in Bankruptcy, presiding, Fred N. Howser, Attorney General of the State of California, and Daniel N. Stevens, Deputy Attorney General, appearing as attorneys for the Controller of the State of California, and no one appearing for Arlie R. Lockwood, the above-named debtor; and proof of service of the aforesaid Order to Show Cause having been filed with said court and no showing having been made at said hearing to contradict the facts alleged in the verified petition of the Controller of the State of California for said Order to Show Cause, the court hereby finds that all of the allegations of said petition are true;

Now, Therefore, It Is Hereby Ordered that the Referee shall prepare his Certificate on Review of said Order of January 16, 1947, without including therein or attaching thereto a reporter's transcript of the proceedings had upon the hearing of said objections to said claim and that said Referee shall not include therein a narrative statement of the

evidence produced on the hearing of the objections to the claim of the Controller for motor vehicle fuel license taxes, and that said Referee shall include in his Certificate on Review of said Order of January 16, 1947, only the claim of the Controller of the State of California and amendments thereto and exhibits attached thereto; the objections by the debtor and receiver to said claim and amendments thereto; the order allowing claim after hearing objections thereto; the receiver's petition for instructions and order thereon; and said debtor's petition for review.

Dated: July 17, 1947.

/s/ HUGH L. DICKSON,
Referee in Bankruptcy.

[Endorsed (Referee's Certificate on Review and attached documents (Pages 11 to 52 of this printed record)]: Filed Nov. 4, 1947, [57] U.S.D.C.

[Title of District Court and Cause.]

REFEREE'S SUPPLEMENTARY
CERTIFICATE ON REVIEW

To the Honorable Campbell Beaumont, Judge of
the United States District Court in and for the
Southern District of California, Central Division:

I, Hugh L. Dickson, Referee in Bankruptcy to
whom the proceedings in this matter were referred,
do hereby certify:

1. That on January 16, 1947, your Referee made,
signed and filed an Order allowing the claims of
the Controller of the State of California as a prior
lien claim for taxes in the sum of \$31,212.08, together
with additional interest amounting to \$71.54
for each and every month or fraction thereof after
December 31, 1946, to date of payment;

2. That on January 5, 1948, the following Order
was entered in the minutes of Judge Harrison:

"The petition of the Debtor for Review of
the Referee's Order of Jan. 16, 1947, having
been heretofore submitted upon the filing of
briefs, and the briefs of counsel having been
filed, and the court having [58] considered the
record, the court hereby directs that this matter
be remanded to the Referee with directions
to prepare adequate findings of fact and conclusions
of law. I feel that this disposition of
the pending review may preclude a reversal by
the Circuit Court on technical grounds."

3. That on September 3, 1948, your Referee made, signed and filed a nunc pro tunc Order amending the aforesaid Order allowing the claim of the Controller of the State of California;

4. That on September 23, 1948, your Referee made, signed and filed Findings of Fact and Conclusions of Law pursuant to the aforesaid Order of Judge Harrison.

Your Referee submits herewith the following:

1. Nunc pro tunc Order amending Order allowing claim after hearing objections thereto, and

2. Findings of Fact and Conclusions of Law re claim of the Controller of the State of California.

Dated: This 28th days of January, 1949.

/s/ HUGH L. DICKSON,
Referee in Bankruptcy.

[Endorsed]: Filed Feb. 8, 1949. [59]

[Title of District Court and Cause.]

NUNC PRO TUNC ORDER AMENDING
ORDER ALLOWING CLAIM AFTER
HEARING OBJECTIONS THERETO

Whereas, it appears that an Order was made and entered on the 16th day of January, 1947, entitled "Order Allowing Claim After Hearing Objections Thereto"; and

Whereas, it appears that it was thereby ordered that the Amended Claim filed by the Controller of the State of California be allowed as a prior lien claim for taxes in the sum of \$31,212.08, together with additional interest amounting to \$71.54 for each and every month, or fraction thereof, after December 31, 1946, to date of payment; and

Whereas, it now appears that said figures were incorrectly set forth as a result of clerical error; and

Whereas, it further appears that said claim should have been allowed as a prior lien claim for taxes in the sum of \$31,160.31 together with additional interest amounting to \$71.42 for each and every month, or fraction thereof, after December 31, 1946, to date of payment, [60]

It Is Hereby Ordered that the aforesaid Order Allowing Claim After Hearing Objections Thereto which was made and entered on the 16th day of January, 1947, in the above-entitled proceedings, be and the same hereby is amended nunc pro tunc to provide that the figure "\$31,160.31" be substituted in lieu of the figure \$31,212.08, and that the figure "\$71.42" be substituted for the figure \$71.54.

Dated this 3rd day of September, 1948.

/s/ HUGH L. DICKSON,
Referee in Bankruptcy.

[Endorsed]: Filed September 3, 1948. [61]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS
OF LAW RE CLAIM OF THE CONTROL-
LER OF THE STATE OF CALIFORNIA

The objections of the above-named Debtor and E. A. Lynch, Receiver, for said Debtor, to the Amended Claim of the State of California, filed herein on October 17, 1946, by the Controller of the State of California, having come on regularly for hearing on the 22nd and 28th days of October, and the 1st and 27th days of November, 1946; Messrs. Paul Magasin and Cobb & Utley, appearing as attorneys for said Debtor; Dechter, Hoyt, Pines & Walsh by Harry A. Pines, Esq., appearing at attorneys for said Receiver, and Robert W. Kenny, Attorney General of the State of California, and Daniel M. Stevens, Deputy Attorney General of the State of California, appearing as attorneys for the Controller of the State of California; and oral and documentary evidence having been introduced in behalf of all of said parties, the Court then considered the same, heard the arguments of counsel, and being fully advised in the premises the Court now makes its Findings of Fact as follows: [62]

FINDINGS OF FACT

I.

That the above-entitled proceedings were initially commenced on August 30, 1946, by the filing of a

petition by the above-named Debtor in this Court under Chapter XI of the Bankruptcy Act.

II.

That on October 4, 1946, the Controller of the State of California filed a verified claim in the above-entitled proceedings asserting thereby that there was due and owing to the State of California from and by Arlie R. Lockwood, the above-named Debtor, motor vehicle fuel license taxes in the sum of \$29,280.85.

III.

That on October 11, 1946, Arlie R. Lockwood and E. A. Lynch, as the Receiver for said Debtor's estate, filed written objections to the allowance of said claim.

IV.

That on or about October 17, 1946, the Controller with the consent of the Court filed an Amended Proof of Priority Claim for Taxes in the sum of \$31,017.47 plus additional interest in the amount of \$71.42 for each and every month, or fraction thereof, commencing November 1st, 1946, to date of payment. To this claim were attached copies of four notices of determination under Sections 7727 and 7728 of the Revenue and Taxation Code of the State of California upon which said claim was based, together with a statement showing the total amount of tax penalties and interest due under all four of said Notices of Determination to October 31, 1946, as a result of the distribution of

motor vehicle fuel by said Arlie R. Lockwood without first having secured a license for that purpose as required by [63] Section 7451 of the Revenue and Taxation Code of the State of California and without having made payment of the tax imposed by the Revenue and Taxation Code of the State of California with respect to such distribution.

V.

That on or about October 22, 1946, the above-named Debtor and E. A. Lynch as Receiver for Debtor's estate duly filed Objections to the Allowance of the aforesaid Amended Claim of the Controller of the State of California thereby alleging that the above-named Debtor is not indebted to the Controller of the State of California for any sum or amount, and particularly is not indebted for any of the items for alleged taxes set forth in said Amended Claim; that the above-named Debtor had not sold or distributed motor vehicle fuel during the months of January, May, June, July and September of 1945, or April and May, 1946, on which a tax had not been paid; and that all motor vehicle fuel sold by the Debtor during the aforesaid months was gasoline on which the motor vehicle fuel license tax had been paid to the State of California.

VI.

That during the months of January, May, June, July and September, 1945, and the months of April and May, 1946, said Arlie R. Lockwood was doing

business as the Dependable Oil Company at 8132 Atlantic Boulevard, Bell, California.

VII.

That during the months of January, May, June, July and September, 1945, and the months of April and May, 1946, said Arlie R. Lockwood, doing business as Dependable Oil Company, was engaged in the business of making sales of motor vehicle [64] fuel.

VIII.

That during the months of January, May, June, July and September, 1945, and the months of April and May, 1946, said Arlie R. Lockwood doing business as Dependable Oil Company had neither applied for nor secured the distributor's license provided for by Article 1 of Chapter 4, Part 2, Division 2 of the Revenue and Taxation Code of the State of California.

IX.

That during the aforesaid months of January, May, June, July and September, 1945, and the months of April and May, 1946, said Arlie R. Lockwood doing business as Dependable Oil Company did nevertheless distribute the following amounts of motor vehicle fuel with respect to which the three cents per gallon tax had not been paid to the State of California as provided for by the Revenue and Taxation Code of the State of California:

Month Sold	Gallons Sold
January, 1945	5,149
May, 1945	73,156
June, 1945	216,539
July, 1945	139,597
September, 1945	17,787
April, 1946	20,988
May, 1946	2,920

X.

That the tax imposed by the Revenue and Taxation Code of the State of California upon the distribution of the aforesaid gallonage of motor vehicle fuel by said Arlie R. Lockwood has at no time been paid to the State of California as required by said Revenue and Taxation Code. [65]

XI.

That the aforesaid Amended Claim filed by the Controller of the State of California on or about October 17, 1946, is predicated solely upon the distribution of the motor vehicle fuel more fully described in Paragraph IX *supra*.

XII.

That none of the amounts set forth in the aforesaid Amended Claim of the Controller as due and owing to the State of California under the Motor Vehicle Fuel License Tax Law, Revenue and Taxation Code of the State of California, Division 2, Part 2, has been paid by said Arlie R. Lockwood to the State of California.

Conclusions of Law

And as conclusions of law from the foregoing facts, the Court finds:

I.

That said Arlie R. Lockwood, the Debtor herein, is indebted to the State of California for motor vehicle fuel license tax, penalties and interest in the amount of \$31,017.47 plus additional interest in the amount of \$71.42 for each and every month, or fraction thereof, commencing November 1st, 1946, to date of payment.

II.

That the amended priority tax claim of the Controller of the State of California in the amount of \$31,017.47 plus additional interest in the amount of \$71.42 for each and every month, or fraction thereof, commencing November 1st, 1946, to date of payment, is an allowable claim and should be paid by [66] E. A. Lynch, the duly appointed Receiver herein.

Dated this 23rd day of September, 1948.

/s/ HUGH L. DICKSON,
Referee in Bankruptcy.

[Endorsed]: Filed September 23, 1948.

[Endorsed] (Referee's Supplementary Certificate on Review and attached documents, pages 53 to 61 of this Printed Record): Filed Feb. 8, 1949, U.S.D.C. [67]

[Title of District Court and Cause.]

NOTICE OF MOTION

To: The State of California and to Howard S. Goldin, Deputy Attorney General:

You Will Please Take Notice that on the 24th day of November, 1947, at the hour of 10 o'clock a.m., in the courtroom of the Hon. Campbell E. Beaumont, United States District Court Judge, the undersigned will move the Court for leave to permit Harry A. Pines of Dechter, Hoyt, Pines & Walsh, as attorneys for the Receiver herein, to appear in connection with the petition for review of the debtor herein as amicus curiae, and in support of this motion will rely upon the files and records of this proceeding, and the points and authorities attached hereto.

Dated this 7th day of November, 1947.

DECHTER, HOYT, PINES &
WALSH,

By /s/ HARRY A. PINES,
Attorneys for the Receiver.

[Endorsed]: Filed November 10, 1947 (Referencee).

[Endorsed]: Filed Nov. 12, 1947, U. S. D. C.

[Title of District Court and Cause.]

NOTICE OF MOTION FOR ORDER TO PER-
MIT ADDITION OF REPORTER'S TRAN-
SCRIPT TO RECORD ON REVIEW

To the Controller of the State of California, Fred
N. Howser, Attorney General, Edward Sumner,
Deputy Attorney General, and to Walter C.
Durst, Attorney for the Bankrupt:

You and each of you will please take notice that
on Monday, the 28th day of February, 1949, at the
hour of ten o'clock a.m., E. A. Lynch, Trustee in
Bankruptcy, through his attorney, Harry A. Pines
of Dechter, Hoyt, Pines & Walsh, will make a mo-
tion in the court room of the Honorable Campbell
Beaumont, Judge of the United States District
Court, for an order permitting the Trustee to fur-
nish and add to the record, a reporter's transcript
of the proceedings which are the subject matter of
the pending review, and for such other and further
relief as may be proper in the premises.

This motion will be made upon the files and rec-
ords of these proceedings, the affidavit attached
hereto, and points and authorities attached hereto.

Dated: February 10, 1949.

DECHTER, HOYT, PINES &
WALSH.

By /s/ HARRY A. PINES,
Attorneys for E. A. Lynch,
Trustee.

Points and Authorities

Section 39-a(8) of the Bankruptcy Act provides that the Referee on review shall transmit to the Clerk of the District Court on review "a transcript of the evidence or a summary thereof."

The question involved on this review is whether or not there is evidence to support the Findings of Fact of the Referee. The Referee has heretofore stated that in the absence of a transcript it is impossible for him to prepare a summary of the evidence (referred to in the Referee's certificate as a "narrative statement of the evidence"). The Trustee has repeatedly offered to furnish such a transcript, but was refused permission to do so by the Referee. The Trustee has recently offered to furnish a transcript at the individual expense of some of the creditors, the cost of which is to be repaid only in the event of a successful culmination of the review, and the Referee has failed and refused to include such transcript in the supplementary certificate.

A review is impossible in this case without either a satisfactory summary of the evidence or a reporter's transcript of the testimony.

To enable a proper review, this Court should order the transcript to be furnished so that the record is adequate, as provided for in Section 39-a(8) of the Bankruptcy Act.

AFFIDAVIT OF HARRY A. PINES IN SUPPORT OF MOTION FOR ORDER TO PERMIT ADDITION OF REPORTER'S TRANSCRIPT TO RECORD ON REVIEW

State of California

County of Los Angeles—ss.

Harry A. Pines, being first duly sworn upon his oath, deposes and says:

That he is an attorney at law and a member of the firm of Dechter, Hoyt, Pines & Walsh, attorneys for E. A. Lynch, as Receiver of Arlie R. Lockwood, Debtor, and now attorneys for E. A. Lynch, as Trustee of Arlie R. Lockwood, Bankrupt.

That these proceedings were initiated as Debtor proceedings under Chapter XI of the Bankruptcy Act, and on October 4, 1946, the Controller of the State of California filed a claim for motor fuel license taxes in the sum of \$29,280.85. That on or about October 11, 1946, objections to the allowance of said claim were filed jointly by the Debtor and by E. A. Lynch, Receiver of the above-named Debtor. That these objections came on for hearing on the 22nd day of October, 1946, and said matter was continued and heard on four or five days subsequent thereto, extensive testimony being given both in support and in opposition to said claim of the State of California. It was the opinion of your affiant, as attorney with extensive experience in the practice of bankruptcy law, that the Referee had allowed the claim (which was in an amount sufficient to completely exhaust the estate), despite the fact

that the record was completely devoid of evidence to support the same. It was the opinion also of your affiant that the Referee had indulged in presumptions which are not properly invokable as against a Receiver or Trustee in Bankruptcy, and that a great injustice had been done to the unsecured creditors of the estate by such action. Consequently, on January 21, 1947, within five days of the Referee's order allowing the claim (Order dated January 16, 1947), your affiant as attorney for the Receiver filed a petition on behalf of the Receiver for instructions, seeking permission for the Receiver to file a petition for a review of said order. On January 21, 1947, the Referee made an order instructing the Receiver not to file a petition for review.

On January 25, 1947, the Debtor filed a petition for review, and the Receiver, because of his obligation to the creditors of the estate, and having been formally prevented by the Referee from seeking relief from the Referee's order, undertook an amicus curiae participation in the review proceedings. Although the petition for review was filed on January 25, 1947, the Referee encountered a very considerable amount of difficulty in preparing a certificate for review and it was not until November 3, 1947, that a certificate on review was filed by the Referee, which certificate lacked either a summary of the evidence or a reporter's transcript thereof, as required by Section 39-a(8) of the Bankruptcy Act. On many occasions between January 25, 1947, and November 3, 1947, and particularly between Janu-

ary 25th and July 31, 1947, your affiant as attorney for the Receiver, urged the Referee to permit the Debtor to expend the funds necessary for a reporter's transcript. On these occasions the Referee had at all times stated that he could not reconstruct the evidence in order to prepare a summary thereof, and the Attorney General's office, who represented the Controller of the State of California, was unable to assist the Referee in preparing such a summary of the evidence. Your affiant has at all times believed that the reason for same is because there is a lack of evidence, which is the very point in connection with the review. The Referee refused to permit money of the estate for the preparation of a reporter's transcript, but called upon the attorneys for the Debtor to pay such fee. The attorneys for the Debtor stated that they had no personal responsibility to pay for such transcript, and that the funds would have to come from the Debtor's estate, which expense the Referee refused to permit. Consequently, no reporter's transcript was available.

On July 10, 1947, the Controller of the State of California filed a petition for an order to show cause which did not name the Receiver as respondent, and under which an order to show cause was issued to the Debtor as to why his attorneys should not pay for the reporter's transcript. Because the Debtor did not have funds, and the attorneys had no responsibility thereunder, Debtor was unable to furnish such funds, and the Referee made an order on July 17, 1947, that the certificate on review would omit either a summary of the evidence or a re-

porter's transcript thereof. Both before and after this hearing, your affiant as attorney for the Receiver of the Debtor had informed the Referee that the estimated cost of a reporter's transcript, to-wit, the sum of approximately \$350.00, was available in the estate, and that the Receiver urged such expenditure, so that an adequate review of the question might be had and the creditors of this estate have their day in court. At all such times, the Referee refused to permit the Receiver to expend such funds. After the certificate was filed, your affiant, as attorney for the Receiver, filed on behalf of the Receiver, points and authorities on the review, in which he asked leave of the District Court to appear *amicus curiae* in support of the petition for review of the Debtor, in which points and authorities he directed attention to the failure of the certificate of the Referee to comply with Section 39 of the Bankruptcy Act, and complained of the fact that Findings of Fact had been requested below, that Findings of Fact were required in support of any order made on the contested issue, and that such review failed to include such Findings of Fact, and requested the opportunity of being heard on this matter, despite the restrictions placed on the Receiver by the Referee's refusal to permit the Receiver to participate in the review. On November 7, 1947, your petitioner gave notice to the State of California that on November 24, 1947, he would move the Court for permission to appear as *amicus curiae*. At the hearing on said motion, the Honorable Benjamin Harrison, District Judge, sitting in place and stead of Judge

Beaumont, granted the Receiver's permission to participate as *amicus curiae*. Since such date, the Debtor was adjudicated a bankrupt, and E. A. Lynch was appointed as Trustee in Bankruptcy. Consequently, the Trustee has inherited the mantle of the Debtor in connection with this review, and is now the moving party thereunder.

At the hearing before Judge Harrison, Judge Harrison remitted the matter to the Referee with directions to prepare adequate Findings of Fact and Conclusions of Law. Such order was made by Judge Harrison on January 5, 1948.

Once again, your affiant informed the Referee that proper Findings of Fact should depend upon an accurate consideration of the evidence, and that a reporter's transcript should be made available for such purpose. The Referee refused to permit the Trustee in Bankruptcy to expend the money for such a transcript.

On July 27, 1948, no Findings of Fact had yet been prepared, and your affiant wrote a three page letter to the Referee informing him that the progress of this estate was completely stymied by the failure of Findings of Fact not being prepared, that the Trustee should be permitted to purchase a reporter's transcript and complete the record so that the matter could be properly disposed of. On August 13, 1948, your affiant received a letter signed by the Honorable Hugh L. Dickson, Referee, which acknowledged receipt of your affiant's letter of July 27th, and in which the Referee stated "You are

hereby authorized to order a reporter's transcript of the hearing in the above entitled action." That within a day or two thereafter, your affiant communicated with Byron Oyler, the Court Reporter who had transcribed the testimony, and requested Mr. Oyler to prepare a transcript of the proceedings. That within two or three days thereafter, Mr. Oyler telephoned your affiant and informed him that the Referee had been contacted by the Attorney General's office, which office had dissuaded the Referee from permitting the Trustee to furnish a transcript of the testimony, and that the Referee had informed Mr. Oyler not to prepare such transcript.

It took the Referee, with the assistance of the Attorney General's office, between January 5, 1948, and September 6, 1948, in which to prepare Findings of Fact and Conclusions of Law. A copy of the proposed Findings of Fact and Conclusions of Law was served upon your affiant on September 7, 1948, and it was immediately apparent to your affiant that said Findings were not supported by the evidence, and your affiant carefully examined voluminous notes that he had taken during the hearing, and on September 9, 1948, sent a copy of proposed amendments to said Findings to the Referee, together with a letter, copy of which was sent to the Attorney General, in which the Trustee asked for an opportunity to be heard on these proposed amendments to the Findings.

Your affiant thereafter presumed that he would be notified of the date of the hearing on the same. On January 27, 1949, your affiant was informed by

Mr. Edward Sumner of the Attorney General's office, that the Referee had signed the Findings presented by the Attorney General's office on September 23, 1948. This was done without any notification to your affiant or to the Attorney General's office. Upon discovery of this fact, your affiant wrote to Referee Dickson on January 27, 1949, and informed the Referee that some of the interested creditors in this proceeding had offered to pay for a transcript, and suggested that in furnishing a supplementary certificate on review, that an opportunity be given to the Trustee to furnish such reporter's transcript at the expense of creditors.

Your affiant received no response to the last mentioned letter to the Referee, except that on February 9, 1949, he received a copy of the Referee's supplementary certificate on review, which makes no provisions for the addition of a reporter's transcript.

Your affiant has been furnished with the sum of \$350.00 by creditors interested in having an adequate record so that this matter may be properly determined by the District Court. Their day in Court would be denied, and possibly great injury to the creditors of this estate would be perpetrated, unless the certificate on review is supplemented by a reporter's transcript.

/s/ HARRY A. PINES.

Subscribed and sworn to before me this 9th day of February, 1949.

/s/ ADELE WALSH PARKER,
Notary Public in and for said County of Los Angeles, State of California.

Affidavit of service by mail attached.

[Endorsed]: Filed February 11, 1949.

At a stated term, to wit: The February Term, A.D. 1949, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Monday, the 28th day of February, in the year of our Lord one thousand nine hundred and forty-nine.

Present: The Honorable Campbell E. Beaumont,
District Judge.

[Title of Cause.]

For hearing motion of Trustee, filed Feb. 11, 1949, for order to permit addition of reporter's transcript to record on review; H. A. Pines, Esq., appearing as counsel for E. A. Lynch, Trustee; Edward Sumner, Deputy Att'y Gen'l for State of Calif., being present; Attorney Pines argues in support of motion; Attorney Sumner argues in opposition; Attorney Pines argues in closing;

Court grants motion and orders that transcript be prepared at expense of creditor Ben Hur Refining

Co. at said creditor's risk, without prejudice to said creditor's application for reimbursement, if Trustee is successful on review, and that reporter's transcript be attached to record on review.

[Title of District Court and Cause.]

MEMORANDUM ON REVIEW

The Bankrupt, Arlie R. Lockwood, was a gasoline broker; that is, he purchased gasoline from manufacturers and processors and resold it to distributors. The State Board of Equalization examined the bankrupt's sales records and from his books made an audit of purchases and sales. The Board discovered from bankrupt's own records that ostensibly he had sold much more gasoline than he had purchased.

Only one gasoline tax is paid to the State of California, irrespective of the number of transactions in which the product may be involved. At various hearings, and particularly before the Referee, the bankrupt testified he purchased no gasoline from any company other than a licensed manufacturer or processor and that all gasoline purchased by him as a broker was tax prepaid.

The State Board of Equalization, after completing its audit of the bankrupt's records, made a jeopardy assessment for gasoline tax on the gasoline sold by bankrupt in excess of the amount which his books indicated he had purchased. A claim was filed in the bankrupt estate, which claim was objected

to, and extensive hearings were had before the Referee.

The evidence disclosed bankrupt had employed five different bookkeepers and that his records were in a very unsatisfactory condition. Several of the auditors who made the investigation and who were called on to testify before the Referee were asked if they could identify any gasoline on which tax had not been paid. One investigator was asked:

“Now you have been unable to find where any of this gasoline, six millions gallons of gasoline he handled, was acquired by him without having paid the tax on it or bought it from someone who did pay the tax on it?”

“A. We have been unable to find any specific instance in which he received gasoline without paying the tax on it.

“.....

“And they were unable to find one load of gasoline that went to Mr. Lockwood’s plant that didn’t come from a refinery who was paying the tax to California?”

“A. That is true, I think. I know of no instance in which they found a load on which the tax had not been paid.”

From the evidence it could be safely ascertained that bankrupt sold a great deal more gasoline than his records indicated he had purchased from refineries and processors. When the bankrupt was unable to establish that the excess gasoline had been purchased from certain refiners and processors and the tax paid, the Board of Equalization assumed

that the gasoline sold by the bankrupt was gasoline on which tax had not been paid, and on that assumption the Board of Equalization made a jeop-
ardly assessment.

During the hearing before the Referee the State of California introduced evidence as to where the bankrupt might have obtained gasoline on which tax had not been paid. One of the witnesses testified:

“During the war there were four principal sources, from which many of our cases developed, and which resulted in determinations and assessments for tax collections as unlicensed distribution, the first one being motor vehicle fuel that was sold by licensed distributors, as taxed, to a Federal Government Agency, particularly the Military Department. * * * That was source No. 1.

“The second source was where gasoline was stolen directly from licensed distributors, through collusion by employees, tank truck drivers and other parties.

“The third case was illegal branding of petroleum products, special selling of those products, such as paint thinners.

“And the fourth was the case of the returned containers that were shipped back, 50-gallon barrels, by the Military to private contractors, who reclaimed the barrels and reconditioned them for again refilling. * * *

“Again, there was the draining of airplanes, which were crated for shipment, by private con-

tractors. Planes had to have sufficient gasoline in them for factory tests and to land the airplane. This was untaxed gasoline. These were drained and picked up by the contractor and put in containers, and they went in all directions with those particular trucks.”

The entire case for the State of California was summed up by the attorney for the Board of Equalization in his argument before the Referee. He said, in part:

“* * * I would like to point out that Mr. Lockwood has been given every opportunity, not only by the staff of the State Board of Equalization, but also by the Court in this proceeding, to explain the difference between the total sales, as shown by his books, and his total purchases, as shown by his books, and that he has failed to give any satisfactory explanation of that difference. I would therefore like to rely upon the well-accepted rule that there is a presumption that if evidence is not produced by a litigant which he can produce which would refute evidence showing liability, that such evidence is adverse and would support his adversary.”

In other words, the Board of Equalization has taken the position that when it can establish that a gasoline broker has sold gasoline in excess of the amount his records indicate was purchased and fails to satisfactorily explain the source of the extra gaso-

line, there is a presumption that it was untaxed gasoline.

The State of California apparently takes the position that it was not necessary to prove the gasoline in question was tax-free gasoline but that the burden was on the bankrupt to establish that the tax had been paid. The Board of Equalization investigators were unable to specifically designate any gasoline on which the tax had not been paid. The claim of the State rests solely upon failure of the bankrupt to establish that the gasoline was tax-paid gasoline; and because the bankrupt was unable to or refused to give evidence showing it was tax-paid gasoline, the Board of Equalization presumed it was gasoline on which the tax had not been paid.

“Where the party on whom the burden of proof rests has failed to make out a prima facie case, the absence of the adverse party, or his failure to testify raises no unfavorable inference against him.”

31 Corpus Juris Secundum 862

There is no question but that the burden of proof is on the State of California to establish that the gasoline in question was tax-unpaid gasoline.

“The inference arising from the failure of a party to testify does not take the place of evidence of material facts, or shift the burden of proof as to relieve the party on whom rests the duty of establishing a prima facie case.”

31 Corpus Juris Secundum 863

In the case of *Franklin v. Skelly Oil Co.*, 141

F.(2d) 568, plaintiff brought an action for damages which occurred as the result of an explosion of a butane gas system. At the trial plaintiff produced evidence of two, separate and independent probable causes, either of which might have been the efficient cause, and there was no evidence tending to show which of the two probably caused the explosion. The Court said, at page 571:

“* * * The mere choice of probabilities does not constitute evidence, but creates only conjecture and surmise on which a verdict of a jury cannot stand.”

In *Stimpson v. Hunter*, 125 NE 155; 7 ALR 1067, the defendant was sued on a dental bill for work performed for a minor son. At the trial the defendant and his son, who were in court, failed or refused to testify. Inasmuch as defendant and his son did not attempt to deny the testimony of the plaintiff, plaintiff attempted to raise a presumption that because they did not testify and deny the facts as alleged and proved this was evidence against them. To maintain the action it was necessary that the plaintiff establish that the work done was authorized by the father or that it was necessary for the health and comfort of the minor son and that the defendant negligently failed to provide his son a dentist to do the necessary work. The Court said:

“The failure of the defendant and his son to testify, although present in court, was not equivalent to affirmative proof of facts necessary to maintain the action. The defendant was

not bound to offer any evidence, unless and until evidence was offered by the plaintiff warranting the submission of the case to the jury.”

In *Parker v. Gulf Refining Co.*, 80 F. (2d) 795, the Court said:

“To submit to a jury a choice of probabilities is but to permit them to conjecture or guess, and where the evidence presents no more than such choice it is not substantial. This has been repeatedly pointed out by this court.”

And again, in *Gulf Refining Co. v. Mark C. Walker & Sons Co.*, 124 F.(2d) 420:

“To submit to a jury a choice of probability is but to permit them to conjecture or guess, and where the evidence presents no more than such choice it is not substantial.”

In this matter the Board of Equalization has attempted to establish four different sources from which the bankrupt might have obtained untaxed gasoline. Under the decisions of the Federal Court, we do not believe that is sufficient. To allow the State's claim to stand would permit a claim based on conjecture or speculation.

The sole question presented on this review is whether the evidence supports the findings. The Referee found that Arlie R. Lockwood, doing business as Dependable Oil Co., distributed certain amounts of motor vehicle fuel with respect to which the 3-cents per gallon tax had not been paid to the State of California. We are of the opinion that

there is not sufficient evidence in the record to sustain this finding.

This matter is remanded to the Referee with instructions to disallow the claim of the State Board of Equalization.

Dated: September 28, 1950.

/s/ HARRY C. WESTOVER,

District Judge.

[Endorsed]: Filed October 2, 1950.

In the District Court of the United States, in and for the Southern District of California, Central Division.

In Bankruptcy No. 44,536-HW

In the Matter of
ARLIE R. LOCKWOOD,

Bankrupt.

FINDINGS OF FACT AND JUDGMENT ON
PETITION FOR REVIEW AND ORDER
THEREON

The petition for review of the Referee's order dated January 16, 1947, allowing the amended claim of the State of California as a prior lien claim for taxes in the sum of \$31,212.08 together with additional interest amounting to \$71.50 for each and every month, or fraction thereof, which order was amended nunc pro tunc on September 3, 1948, by the substitution of the figure of \$31,160.31 in lieu of \$31,212.08 and by the substitution of the figure of

\$71.42 in lieu of \$71.54, was submitted to this Court upon the Referee's Certificate on Review dated November 3, 1947, the Referee's Supplemental Certificate on Review dated January 26, 1949, the reporter's transcript of the proceedings before the Referee which took place on October 22, October 28, November 1, November 27 and December 20, 1946, and the briefs and memoranda filed herein by Fred N. Howser, Attorney General, and Edward Sumner and Daniel N. Stevens, Deputies of said Attorney General, in behalf of the Controller of the State of California, and by Dechter, Hoyt, Pines & Walsh and Harry A. Pines, as attorneys for E. A. Lynch, formerly receiver and now Trustee in Bankruptcy of the above-entitled bankrupt, and by Paul Magasin and Cobb and Uteley, Attorneys for Arlie R. Lockwood as debtor, under Chapter XI proceedings, and the Court having taken the matter under submission, and having on September 28, 1950, filed a Memorandum on Review holding that there is not sufficient evidence in the record to sustain the findings of the Referee, which said Memorandum on Review was entered on October 2, 1950,

It Is Ordered that the Findings of Fact and Conclusions of Law and order of the Referee be and the same are hereby set aside and vacated, and being fully advised of the evidence in the record of this case, the Court makes Findings of Fact and Conclusions of Law as follows, to wit:

Findings of Fact

I.

That during the months of January, May, June,

July and September of 1945 and the months of April and May, 1946, Arlie R. Lockwood, the above-named bankrupt, was a broker of motor vehicle fuels, duly licensed as a broker under the Motor Vehicle Fuel License Tax Act of the State of California, and was engaged in business in such capacity as the Dependable Oil Company at 8132 Atlantic Boulevard, Bell, California.

II.

That during the time mentioned in Finding No. I, the said Arlie R. Lockwood was engaged in the business of selling motor vehicle fuel.

III.

That certain sales invoices found among the records of the said Arlie R. Lockwood indicate sales of gasoline during the months described in Finding No. I in excess of the number of gallons reflected by reports regularly filed by the said Arlie R. Lockwood with the Board of Equalization of the State of California, purporting to be an accurate record of the sales made by him as a licensed broker of motor vehicle fuel during the such monthly periods. That the number of of excess gallons of gasoline so reflected by such sales invoices are as follows:

Month	Gallons
January, 1945.....	5,149
May, 1945.....	73,156
June, 1945.....	216,539
July, 1945.....	139,597
September, 1945.....	17,787
April, 1946.....	20,988
May, 1946.....	2,920

IV.

That the Motor Vehicle Fuel License Tax Act of the State of California imposes but one tax upon the sale or distribution of motor vehicle fuel, and that resales of said motor vehicle fuel, irrespective of the number thereof, are not subject to further levy of motor vehicle fuel tax.

That there is no evidence that the motor vehicle fuel purchased and sold by said Arlie R. Lockwood during the periods of time described in Finding No. I was not purchased from licensed manufacturers or distributors who had already paid the motor vehicle tax on such fuel.

V.

That during the month of July, 1945, the said Arlie R. Lockwood, by mistake, blended 792 gallons of kerosene with pressure appliance fuel, thus converting the same to motor vehicle fuel and incurring a tax under the Motor Vehicle Fuel Tax Act in the sum of \$23.76.

That Arlie R. Lockwood during the periods of time described in Finding No. I incurred no motor vehicle fuel tax liability to the State of California, other than the sum of \$23.76.

Based Upon the Foregoing Findings of Fact, This Court Makes the Following

Conclusions of Law

I.

Only one motor vehicle fuel tax is paid to the State of California, irrespective to the number of

transactions in which the product may be involved.

II.

Seven hundred ninety-two (792) gallons of motor vehicle fuel inadvertently blended by the bankrupt represents the total amount of motor vehicle fuel sold or handled by the bankrupt upon which motor vehicle fuel tax had previously not been paid.

III.

The State of California is entitled to the allowance of a claim in the amount of \$23.76, together with interest thereon.

IV.

That other than the allowance of the claim of the State of California in the amount of \$23.76, the claim of the State of California should have been disallowed by the Referee in Bankruptcy.

Based Upon the Foregoing Findings of Fact and Conclusions of Law, It is Hereby Ordered, Adjudged and Decreed that the order of the Referee, Hugh L. Dickson, dated January 16, 1947, as amended nunc pro tunc under date of September 3, 1948, the effect of which was to allow the claim of the State of California as a prior tax claim and lien in the sum of \$31,160.31 together with interest thereon, be and the same is hereby reversed.

It Is Further Ordered, Adjudged and Decreed that this matter be and it hereby is remanded to the Honorable Hugh L. Dickson, Referee in Bankruptcy, and the said Referee is hereby directed to enter an order disallowing the claim of the State

of California in the amount of \$31,160.31, and allowing the same only for the amount of \$23.76, together with such interest thereon as is properly allowed by law.

Dated: This 3rd day of Nov., 1950.

/s/ HARRY C. WESTOVER,
U. S. District Judge.

Approved As To Form.

DECHTER, HOYT, PINES &
WALSH.

By /s/ HARRY A. PINES,
Attorneys for E. A. Lynch, Trustee in Bankruptcy
of the Above Entitled Bankrupt.

Receipt is hereby acknowledged:

FRED N. HOWSER,
Attorney General.

By /s/ EDWARD SUMNER,
Deputy Attorney General, Attorneys for Controller
of the State of California, Claimant.

Judgment entered Nov. 3, 1950.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed November 3, 1950.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that the Controller of the State of California, claimant in the above-entitled matter, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Order of the Honorable Harry C. Westover entered on the 3rd day of November, 1950, on Petition for Review of Referee's Order allowing taxes claimed by said Controller of the State of California under the Motor Vehicle Fuel License Tax Act of the State of California, in the sum of \$31,160.31, plus interest in the sum of \$71.42 per month, or fraction thereof, after December 31, 1946 to date of payment.

Dated: November 28, 1950.

FRED N. HOWSER,
Attorney General,

/s/ EDWARD SUMNER,
Deputy Attorney General, Attorneys for Controller
of the State of California.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed November 29, 1950.

[Title of District Court and Cause.]

UNDERTAKING FOR COSTS ON APPEAL

Know All Men By These Presents, that the Fidelity and Deposit Company of Maryland, a corporation organized and existing under the laws of the

State of Maryland, and duly licensed to transact business in the State of California, is held and firmly bound unto E. A. Lynch, Trustee in Bankruptcy for Arlie R. Lockwood, Bankrupt in the above-entitled matter, in the penal sum of Two Hundred Fifty and No/100 Dollars (\$250.00) to be paid to said E. A. Lynch, Trustee in Bankruptcy for Arlie R. Lockwood, his successors, assigns, or legal representatives, for which payment well and truly to be made, the Fidelity and Deposit Company of Maryland binds itself, its successor and assigns, firmly by these presents.

The Condition of the Above Obligation Is Such, that

Whereas, The Comptroller of State of California is about to take an appeal to the United States Court of Appeals for the Ninth Circuit from an order on petition for review, made and entered November 3rd, 1950, by the United States District Court for the Southern District of California, Central Division, in the above-entitled action.

Now, Therefore, if the above named Appellant, The Comptroller of State of California, shall prosecute said appeal to effect and answer all costs which may be adjudged against him if the appeal is dismissed, or the judgment affirmed, or such costs as the Appellate Court may award if the judgment is modified, then this obligation shall be void; otherwise to remain in full force and effect.

It Is Hereby Agreed by the Surety that in case of default or contumacy on the part of the Princi-

pal or Surety, the Court may, upon notice to them of not less than ten days, proceed summarily and render judgment against them, or either of them, in accordance with their obligation and award execution thereon.

Signed, sealed and dated this 28th day of November, 1950.

**FIDELITY AND DEPOSIT
COMPANY OF MARYLAND,**

By /s/ ROBERT HECHT,
Attorney in Fact.

Examined and recommended for approval as provided in Rule 8.

/s/ EDWARD SUMNER,
Attorney.

Approved this day of, 1950.

.,
Judge.

State of California

County of Los Angeles—ss.

On this 28th day of November, 1950, before me, Theresa Fitzgibbons, a Notary Public, in and for the said County of Los Angeles, State of California, residing therein, duly commissioned and sworn, personally appeared Robert Hecht, known to me to be the Attorney-in-Fact of the Fidelity and Deposit Company of Maryland, the Corporation that he executed the within instrument, and acknowledged to

me that he subscribed the name of the Fidelity and Deposit Company of Maryland thereto and his own name as Attorney-in-Fact.

[Seal]: /s/ THERESA FITZGIBBONS,
Notary Public in and for the County of Los Angeles,
State of California.

My Commission Expires May 3, 1954.

[Endorsed]: Filed November 29, 1950.

[Title of District Court and Cause.]

APPELLANT'S DESIGNATION OF RECORD
ON APPEAL

To The Clerk of the Above Entitled Court:

Appellant, Controller of the State of California, claimant in the above-entitled matter, through counsel, hereby designates the entire record before the District Court, including all papers, pleadings and other documents certified to the District Court by the Honorable Hugh L. Dickson, Referee in Bankruptcy, with his Certificate on Petition for Review of his Order of January 16, 1947, allowing the claim of the Controller of the State of California for taxes due from the bankrupt herein under the California Motor Vehicle Fuel License Tax Law in the sum of \$31,160.31, plus interest in the sum of \$71.42 per month, or fraction thereof, after December 31, 1946 to date of payment.

Specifically, the record designated should include the following:

1. The Referee's Certificate on Review filed with the Clerk of this Court on November 4, 1947;
2. The various documents transmitted with the aforesaid Certificate on Review, as specifically itemized on pages 6 and 7 of that Certificate;
3. The Notice of Motion dated November 7, 1947 by the attorneys for the receiver herein for leave to appear in connection with the aforesaid Petition for Review and the Points and Authorities filed with said Notice;
4. The "Points and Authorities on Review" filed by the attorneys for the debtor and the receiver, respectively, in November, 1947;
5. The Referee's Supplementary Certificate on Review filed with the District Court in January, 1949, and the documents transmitted therewith as specifically described on page 2 of said Certificate;
6. Notice of Motion for Order to permit addition of Reporter's Transcript to record on review, dated February 10, 1949;
7. The Order of Judge Beaumont permitting the addition of the aforesaid Reporter's Transcript;
8. Transcript of the proceedings before the Honorable Hugh L. Dickson on the hearing of Objections to the allowance of the aforesaid claim of the Controller of the State of California;

9. The Memorandum Decision of the Honorable Harry C. Westover on the aforesaid Petition for Review;

10. The Findings of Fact, Conclusions of Law and Order (Judgment) on Petition for Review signed by the Honorable Harry C. Westover and entered November 3, 1950 in Judgment Book No. 69, page 15.

Pursuant to the provisions of Rule 75(o) of the Rules of Civil Procedure for the United States District Court and pursuant to Rule 11 of the Rules of the United States Court of Appeals for the Ninth Circuit, as amended, request is hereby made that the Clerk of the above-entitled court transmit all the original papers in the file dealing with the action or the proceedings in which the appeal has been taken, including the Notice of Appeal and this Designation.

Dated at Los Angeles, California, this 28th day of November, 1950.

FRED N. HOWSER,
Attorney General.

/s/ EDWARD SUMNER,
Deputy Attorney General, Attorneys for Controller
of the State of California.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed November 29, 1950.

In the District Court of the United States for the
Southern District of California, Central Division

In Bankruptcy, No. 44,536-B

In the Matter of
ARLIE R. LOCKWOOD,

Bankrupt.

Before: The Honorable Hugh L. Dickson, Referee
in Bankruptcy.

HEARING ON OBJECTIONS OF DEBTOR
AND RECEIVER TO CLAIM OF THE
CONTROLLER OF THE STATE OF CALI-
FORNIA, AND L. A. McKEE, CHIEF,
DIVISION OF TAX COLLECTION, CON-
TINUED FROM OCTOBER 17, 1946

Appearances:

For Receiver Lynch:

DECHTER, HOYT, PINES &
WALSH, By
HARRY A. PINES, ESQ.

For the Debtor:

COBB & UTLEY, By
FRANCIS COBB, ESQ.

For the State of California, Claimant:

ROBERT W. KENNY, ESQ.,
Attorney General, By

DANIEL N. STEVENS, ESQ.,
Deputy Attorney General.

For Elm Oil Company and Palomar Refining Company:

FORSTER & GEMMILL, By
JOHN G. GEMMILL, ESQ. [1*]

Tuesday, October 22, 1946. 2 P.M.

The Referee: In the matter of Arlie R. Lockwood.

Mr. Cobb: In that matter, your Honor, we filed objections to the Controller's claim and we think that should be taken up first in that the successful presentation of a plan of arrangement depends upon the determination of that obligation. We claim there is no sum due. The State is claiming some \$30,000, 50 per cent of which is penalties. We filed the original objections and noticed it for hearing. It was continued until today at the request of the Attorney General. In the meantime they filed an amended claim. I have drawn written objections to the amended claim, so that the record will be straight, but I have been waiting for Mr. Lynch to arrive to sign it. If I may have time to have that done now I will file it.

The Referee: If I should rule adversely to the State and they should appeal it, your plan will be way in the future, won't it?

Mr. Cobb: That is something we will have to meet when it comes around.

Mr. Pines: I might say this, from the position of the Receiver, the objections of the debtor to which the Receiver has joined makes it largely a factual

situation. If the evidence is such as the Receiver indicated to me and the Board of Equalization will admit it then there's no tax [2] due and owing. It all depends on whether there were taxable transactions, where there was distribution of gasoline on which no taxes were paid. It is either one or the other. The Receiver wants the chips to fall where they may.

The Referee: It will be refreshing to have that. All right, sir.

Mr. Stevens: If the Court please, I would like to offer in evidence certified copies of the four determinations issued by the State Board of Equalization upon which the amended claim of the State Controller is based.

The Referee: What is the amount of your amended claim?

Mr. Stevens: It is 31,000.

The Referee: 31,017.47 plus interest at 71.42?

Mr. Stevens: The additional interest has not yet accumulated. It will not accumulate until after November 1st.

The Referee: Have you seen those documents?

Mr. Cobb: Yes, your Honor. At this time we object to their introduction on the ground it appears on the face of them they are what is known as a jeopardy assessment, not based on any factual situation.

The Referee: Mr. Langharn had a case where they made a jeopardy assessment on a Japanese who planted some seeds in the spring. They said he must have earned at least \$25,000 the first year. I

will have to sustain the objection until you show some basis for levying this assessment. [3]

Mr. Stevens: I would like to refer briefly to the Revenue and Taxation Code.

Mr. Pines: So that the record is clear, the Receiver wishes to join in the objection.

The Referee: All right. I have no doubt but what you have a right to make a jeopardy assessment, but I will not accept this in evidence until you have shown me there is some tax due. You gentlemen can sit in an office and say, "Bill Jones must have made two million dollars," and put on a jeopardy assessment. You better put on your evidence and let us see what this fellow did for which you say you had a right to tax him on.

Mr. Stevens: At this time I want to object to the introduction of any evidence in this court going into the amount of this particular tax, on the ground this Court has no jurisdiction under any provision of the Bankruptcy Act to make a determination on that point.

The Referee: Your objection is very promptly overruled. I don't know where you would go if I had no authority to handle these bankruptcy estates.

Mr. Stevens: This is a Chapter XI proceeding, your Honor, and Section 64(a)4 does not apply in this proceeding.

The Referee: That is bankruptcy the same as any other case. The objection is overruled. Let's get down to the proof that this man owes you something.

Mr. Stevens: Do I understand your Honor to be

taking [4] the position at this time then that the finding of our prima facie case does not even require the objecting party to carry the burden of proof here?

The Referee: I will insist that you show what transactions this man had which entitled the State to put a tax on his business. You certainly have the facts or you wouldn't have levied this assessment.

Mr. Stevens: Frankly, your Honor, I don't believe you have the authority to make a determination as to the validity of our claim, particularly in the absence of any showing by the objecting parties here which would contradict the prima facie case made out by our claim.

The Referee: I differ with you. If I am wrong there is a higher court to tell us who is right. I have the first chance to rule on these matters, and if I make the wrong decision you have a plain, speedy and adequate remedy for review, and then you can go to the Circuit Court. Are you prepared to proceed and prove any operations on the part of Lockwood which would entitle the State to tax him?

Mr. Stevens: Yes, your Honor, I am prepared to proceed.

The Referee: Let's go.

Mr. Stevens: I am just trying to make up my mind whether I want to put the State in the position of proceeding in view of your Honor's ruling.

The Referee: You are the man to determine that. [5]

Mr. Stevens: I would appreciate it if your Honor would give me a couple of minutes to make up my mind in that regard.

The Referee: If you want me to we will take a 10 minute recess so that you can deliberate in quiet.

Mr. Stevens: Yes, I would like to do that, if your Honor please.

The Referee: All right, sir.

(A short recess was taken at this point.)

Mr. Stevens: I am ready, your Honor. In order that the Court will be fully informed I would like to direct your Honor's attention to Section 7730 of the Revenue and Taxation Code of the State of California.

The Referee: Yes, sir.

Mr. Stevens: It reads as follows: "In the suit a copy of the jeopardy determination certified by the secretatry of the Board or by the Controller, shall be prima facie evidence that the licensed distributor is indebted to the State in the amount of the license tax, penalties and interest computed as prescribed by Section 7706."

The Referee: Now tell me how does Section 7706 tell you to compute it, so that I will be thoroughly informed on this matter?

Mr. Stevens: Section 7706 reads: "All jeopardy determinations, including those made under Section 7704, exclusive of penalty, shall bear interest at the rate of $\frac{1}{2}$ of [6] 1 per cent per month, or fraction thereof, from the first day of the second calendar month following the close of the monthly period

for which the amount or any portion thereof should have been returned until the date of payment.”

The Referee: Is there any *modus operandi* by which you determine the amount of tax due?

Mr. Stevens: Yes, your Honor, there is.

The Referee: Is that the same that you use for a jeopardy assessment?

Mr. Stevens: This is a jeopardy determination to which I am referring.

The Referee: I realize that, but how do you arrive at the amount of tax due? Don't you have some books or records or figures or something to go on?

Mr. Stevens: Yes, we do.

The Referee: In other words, you cannot sit in your office and say, “Well, I assume this gentleman should pay \$10,000 in taxes.” You must have some figures to base it on, is that correct?

Mr. Stevens: That is correct, your Honor. The article under which this particular levy was made is Article IV.

Mr. Cobb: What section?

Mr. Stevens: Part 2 of Division 2 of the Revenue and Taxation Code, beginning with Section 7726 to and including Section 7732. Section 7726 provides, “If any person becomes [7] a distributor without first securing a license, the license becomes immediately due and payable on account of all motor vehicle fuel distributions made by him.”

Section 7727 provides the method in which that shall be determined, and reads, “The Board shall forthwith ascertain as best it may the amount of

the distributions and shall determine immediately the license tax on the amount, adding to the license tax a penalty of 100 per cent of the amount of the tax, and shall give the unlicensed distributor notice of this determination as prescribed in Section 7493. Provisions of Sections 7699 and 7700 shall be applicable with respect to the finality of the determination and the right of the unlicensed distributor to petition for a redetermination."

Section 7699 provides, "If the amount of tax, interest, and penalty specified in the jeopardy determination is not paid within 10 days after service upon the distributor of notice of the determination, the determination becomes final, unless a petition for redetermination is filed within the 10 days, and the delinquency penalty and interest provided in Article II of this Chapter shall attach to the amount specified."

Section 7700, which provides for the petition for redetermination, reads as follows: "The distributor against whom a jeopardy determination is made may petition for the redetermination thereof pursuant to Article 3.5 of this [8] chapter. He shall, however, file the petition for redetermination with the Board within 10 days after the service upon him of notice of the determination. The distributor shall also within the 10-day period deposit with the Board such security as it may deem necessary to insure compliance with this part."

The Referee: That is all very interesting, but can you read me a section that gives me some idea

as to how you determine the amount of tax to levy on a man?

Mr. Stevens: The only provision with regard to an unlicensed distributor is that contained in Section 7727, which reads, "The Board shall forthwith ascertain as best it may the amount of the distributions and shall determine immediately the license tax on the amount, adding to the license tax a penalty of 100 per cent of the amount of the tax, * * *"

The Referee: What do you construe those words to mean "as best it may"? Does he have to make an examination of any records or anything?

Mr. Stevens: That is the only way I have known it to be done.

The Referee: Then put on your proof as to what you found. That is what I want. In one of these assessment you say in January this man sold 4,349 gallons. Now prove that. You say in July he sold 138,805 gallons. Let's see where you get that information.

Mr. Stevens: If the Court please, I am not trying to [9] be impudent, but in view of Section 7730, to which I referred, I am again offering certified copies of the notices of determination in evidence in this proceeding.

The Referee: I will make the same ruling without attempting to be impertinent. I am firmly of the opinion that, having said this party owes you money for taxes, you should prove it.

Mr. Stevens: Will the Court mark the proposed exhibit?

The Referee: I will mark it for identification.

Mr. Stevens: So that it may be made a part of the record.

The Referee: I will do that, yes, sir.

Mr. Stevens: How will that be designaated, your Honor?

The Referee: I will mark it Claimant's Exhibit No. 1. You are the tax claimant here so we will mark it Claimant's Exhibit No. 1 for identification. Mr. Laugharn had this same type of case and he made the same ruling I am making now. It was reviewed and went to the Ninth Circuit, and they sustained it as against the United States Government. I am sure they would not show any preferential treatment no matter who the taxing authority was. It was held that it was incumbent upon the taxing authority to show the records, where they got these figures, and upon what they based their claim.

(The documents were marked Claimant's Exhibit 1 for identification.) [10]

Mr. Stevens: I would like at this time to call Mr. Harold S. Williams to the stand.

HAROLD S. WILLIAMS

called as a witness on behalf of the claimant, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Stevens:

Q. Mr. Williams, will you state your name?

A. Harold S. Williams.

Q. What is your occupation?

A. Supervising Investigator, State Board of Equalization.

(Testimony of Harold S. Williams.)

Q. I show you a photostatic copy of what is designated "Notice of Determination Motor Vehicle Fuel License Tax, State Board of Equalization, Form 60," dated August 6, 1946, at the top of which opposite the printed words "License Number" appears the typewritten number B-1385, and ask you if you can identify that document?

A. This is a certified copy, or rather a photostatic copy of an assessment that I had in my possession.

Q. When did you receive that in your possession?

A. About the 10th of August, I believe.

Q. Of this year? A. Of 1946.

Q. What did you do with that notice of determination? [11]

A. I endeavored to contact Mr. Lockwood personally to serve this notice of determination upon him.

Q. Did you do so? Did you serve it upon him?

A. I did finally on August 3, 1946. He finally returned from Oregon and I served it on him at that time personally.

Mr. Stevens: That is all.

The Referee: Any cross-examination, gentlemen?

Mr. Cobb: Yes, your Honor, one question.

Cross-Examination

By Mr. Cobb:

Q. You don't know anything about the document

(Testimony of Harold S. Williams.)

other than you received it from some officer to serve?

A. I received it from some officer to serve.

Mr. Cobb: That is all.

Mr. Stevens: I have nothing further from Mr. Williams.

The Referee: All right, Mr. Williams. Call your next witness.

Mr. Stevens: I would like to call Mr. Akers to the stand.

JOSEPH C. AKERS

called as a witness on behalf of the claimant, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Stevens:

Q. Will you state your full name? [12]

A. Joseph C. Akers.

Q. What is your occupation?

A. I am an attorney and referee employed by the State Board of Equalization.

Q. Are you familiar with the notices of determination issued by the State Board of Equalization for motor fuel license tax assertedly due from the debtor in this proceeding?

A. I have seen copies, yes, our office copies.

Q. Did you have a conversation with the Receiver for the debtor in this proceeding, Mr. Lynch?

A. I did.

Q. On September 5, 1946?

(Testimony of Joseph C. Akers.)

A. I did. My first conversation with Mr. Lynch on this matter was on September 3rd, and we were in communication daily thereafter during that week.

Q. Did you have any conversation with Mr. Lynch as to the right of the debtor or the Receiver to file a petition for redetermination of the determination of August 6, 1946, against Mr. Lockwood in the amount of \$27,799.22? A. I did.

Q. What did you say and what did he say?

Mr. Cobb: To which we object on the ground it would be immaterial. The right to file a determination is given by statute. It is not required under the Bankruptcy Act. After bankruptcy had intervened the right to file a claim [13] is required under the bankruptcy section. All taxing agents are required to file claims under Section 57(n) and any conversation he would have with the Receiver about going before him as Referee to have this matter determined would not be binding on any creditors or this court.

The Court: I think that is true. Objection sustained.

Mr. Stevens: I will offer to prove by this witness that in response to my question he would testify that in this conversation he advised Mr. Lynch that he had until the evening of September 5, 1946, within which to file with the State Board of Equalization a petition for redetermination of the last determination of August 6, 1946, in the amount of \$27,799.22.

(Testimony of Joseph C. Akers.)

Mr. Pines: Did I understand you to say he had until September 5th?

Mr. Stevens: That is correct.

Mr. Pines: And this was on September 5th, this conversation?

Q. (By Mr. Stevens): Was it September 5th or September 3rd, Mr. Akers?

A. My conversation in which I advised Mr. Lynch of that fact was on September 3rd. September 3rd was 10 days after the service which the previous witness testified to. Claimant's Exhibit No. 1 for Identification I believe refers to September 5th as the date of its becoming final. [14]

The Referee: Is that all of your offer, Mr. Stevens?

Mr. Stevens: That is all I am offering on that particular conversation, if the Court please.

The Referee: The offer is denied.

Q. (By Mr. Stevens): At or about the same time did you have a conversation with Mr. Francis Cobb, attorney for the debtor in this proceeding?

A. I did.

Q. What was stated in that conversation?

A. Mr. Cobb called our office late in the afternoon of September 3rd, stating, as nearly as I now recall our conversation over the telephone, that he understood the Board asserted a lien claim against Mr. Lockwood as debtor in this proceeding in the amount of some \$27,000. He called my attention to the fact that an order had been issued by your Honor about the 30th of August in which Mr. E. A.

(Testimony of Joseph C. Akers.)

Lynch was appointed Receiver in this matter, that that would in his opinion supersede any right of the agents of the State Controller to seize any property of Mr. Lockwood; that he felt the lien of the State, being one provided by statute, came under Section 67(c) of the Bankruptcy Act and needed to be perfected by the filing. I believe the language of that statute is "Notice thereof with the Court." I did not agree with Mr. Cobb in that interpretation of the State statute, the Motor Vehicle Tax License Law. I advised him so.

Prior to concluding our conversation I said, [15] "You know that a jeopardy determination has been issued by the Board against Mr. Lockwood which differs from an ordinary determination only in that that if a petition for redetermination is desired"—which is the distributor or against whom it is issued, and I believe I was working then with the date of September 3rd in mind—"you have until midnight tonight to get something off in the mail to Sacramento postmarked at least September 3rd in the form of a petition for redetermination of this matter."

Mr. Cobb advised me that he felt that in view of the fact that a debtor proceeding had been commenced the provisions of the Bankruptcy Act applied: that he thought the Referee's Court was the only court that he should go before, and that he did not desire to submit Mr. Lockwood to the jurisdiction of the Board by filing a petition for redetermination with the Board. That in substance I believe

(Testimony of Joseph C. Akers.)

is the conversation, except we agreed to keep in touch with each other regarding subsequent developments.

Mr. Cobb: We move to strike on the ground it is irrelevant and immaterial and has no bearing upon the claim or any of the issues involved by the objection to the claim.

The Referee: Your motion will be granted.

Mr. Stevens: That is all I have to ask of this witness.

The Referee: Any questions?

Mr. Cobb: No. [16]

The Referee: All right, sir, that is all.

Mr. Stevens: At this time, in view of the identification of the second photostat in Claimant's Exhibit 1 for Identification, I would like to offer that particular determination in evidence.

The Referee: Your offer is denied. You haven't proved any tax yet. You have simply proved the claim that he owed. Now prove that he owed you.

Mr. Stevens: May it be stipulated, Mr. Cobb and Mr. Pines, that none of these determinations of the State Board of Equalization for motor vehicle fuel license tax, copies of which are attached to the amended complaint of the Controller of the State of California now on file, have been paid?

Mr. Cobb: I will stipulate that no tax has been paid to the State of California, the State Board of Equalization, by the debtor herein, and as a distributor—since we do not contend he was a distributor—and that as a broker he has filed returns and paid

taxes in accordance with those returns; but I am not willing to lay the foundation for the introduction of this document by stipulation. That is the point I am afraid of.

Mr. Stevens: Then I will do it this way.

The Referee: I will say very frankly, counsel, that document does not prove anything. You have got to bring in the facts and figures here. That is a mere summary. [17] Somebody somewhere somehow made up his mind that the man owed that amount of taxes; he wrote it out on a piece of paper and set the figures out. Now I want you to show by some books and records how you arrived at the conclusion that the man sold that amount of gasoline, otherwise I am not going to allow this claim, that is all there is to it. You might as well get my position clear in your mind right now. A tax claim is like any other claim. It has to be proved. Have I made myself clear?

Mr. Stevens: I think you have, your Honor, but just to make sure I will ask your Honor if by your ruling you mean that the——

The Referee: I mean very definitely——

Mr. Stevens (Continuing): ——that Mr. Lockwood, the debtor in this proceeding, and Mr. Lynch, the Receiver in this proceeding, do not have to make any proof in support of their objections to this claim?

The Referee: That is my ruling exactly. You have to show that they owe you some money; otherwise I will not allow the claim.

Mr. Stevens: Then I would like to finish making my record.

The Referee: Go right ahead.

Mr. Stevens: I will call Mr. Lynch to the [18] stand.

E. A. LYNCH

called as a witness on behalf of the claimant, being first duly sworn, testified as follows.

Direct Examination

By Mr. Stevens:

Q. Your name is E. A. Lynch?

A. That is right.

Q. You are the Receiver of Arlie R. Lockwood, the Debtor? A. Right.

Q. Have you seen the originals of the four assessments, photostatic copies of which are attached to Claimant's Exhibit 1 for Identification?

A. The originals of these?

Q. Yes.

A. I don't think so. They are filed here in the court, no doubt. I may have copies of them in my file.

Q. They were not filed in court. We filed a claim with copies attached.

A. I have some claims in my file in my office, but I can't identify these from that. I don't recall these specifically.

Q. You have not seen these. You don't recall any one of these?

(Testimony of E. A. Lynch.)

A. Not right now. No, I can't say that I do. Let me see what the amounts are. [19]

These are dated back to August 6th. The only ones that I recall at the moment are some that came to my office in the past 10 days.

Q. Would those be the first, second and third—or the first, third and fourth?

A. I wouldn't know unless I would see my files.

Q. You are in possession of all of the records of the debtor, are you, Mr. Lynch?

A. There they are right over there (pointing). Do I understand this was served on me?

Q. I believe they were served on Arlie R. Lockwood.

A. Well then I didn't see them.

Q. You would say that you do not have them in your possession?

A. Not that I know of. That is not a proof of debt form. I don't recall seeing those, no.

Q. This is not a proof of debt.

A. I may be wrong.

Q. This is a notice of determination.

A. I don't recall seeing those right now. Mr. Lockwood may have had them, but I didn't pay any attention to them.

Q. Have you paid any of these assessments to the State Controller? A. No.

Mr. Stevens: That is all. [20]

(Testimony of E. A. Lynch.)

Cross-Examination

By Mr. Cobb:

Q. Mr. Lynch, you have not operated as a distributor of gasoline since your appointment as Receiver, have you? A. Distributor of gasoline?

Q. Yes.

A. No, only the retail station for about two or three days there.

Q. Has the State Board spent any time in examining the books and records since this receivership?

A. Oh, yes.

Q. How many men and how long have they worked in that connection?

A. I see two of them now, and I think two others—probably four auditors were going over the records.

Q. For about how many days?

Mr. Stevens: I object to this line of questioning and move to strike the answers on the ground it is going outside of the scope of the direct examination.

The Referee: The motion is denied. I am here to hear the truth and the facts. I don't know whether it is strictly within the scope of cross-examination or not, but I am looking for the truth always. The motion is denied. I issued a subpoena a day or so ago to the custodian of the State in order to have all records brought in here. What did you have me do that for? [21]

Mr. Stevens: So that after the objecting parties

(Testimony of E. A. Lynch.)

in this case had put on their case we would put on our rebuttal.

The Referee: You had better put on yours first.

Mr. Cobb: We don't know the grounds of the objections.

The Referee: That is true. You wouldn't know where to start. It is asking you to prove the negative.

Mr. Cobb: That is right.

The Referee: Which I never did learn was the law, unless you can teach it to me now. You affirm that they owe you. I say prove it. Then it is up to them to show by denial that they don't owe it. I am not going to revolutionize the whole system of jurisprudence to suit some taxing authority. You asked that the books be brought in here, now use them. You had your auditors working on them. Put your auditors on and let's find out about it. That is my position, gentlemen.

Mr. Stevens: I have no further questions.

Mr. Cobb: That is all.

The Witness: They were there five or six days altogether, maybe longer than that. I didn't keep track of that.

Mr. Cobb: That is all.

The Witness: They were coming and going. Is that all?

Mr. Cobb: That is all.

Mr. Stevens: I have no further questions of Mr. Lynch.

The Referee: Call your next witness. [22]

Mr. Stevens: I would like to call Mr. Lockwood to the stand.

ARLIE R. LOCKWOOD

called as a witness on behalf of the claimant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Stevens:

Q. Mr. Lockwood, do you recognize the notices of determination attached to Claimant's Exhibit 1 for Identification?

A. I only recognize one in detail. The rest of them I assume are copies of what I received in the mail the past few days.

Q. Have you paid any of these determinations?

A. Well, I don't know, because in the regular course of my business I assumed that includes sales tax and other taxes they have been auditing for.

Q. If you will examine these four notices of determination again, they are for Motor Fuel License Tax.

A. No. Then I haven't paid any of them.

Mr. Stevens: That is all.

Cross-Examination

By Mr. Cobb:

Q. Mr. Lockwood, did you at any time act as distributor of motor fuel under the Motor Vehicle Fuel License Act of the State of California? [23]

A. No.

(Testimony of Arlie R. Lockwood.)

Q. You were a broker, were you?

A. That is correct.

Q. As a broker you buy the gasoline tax paid or unpaid?

A. Tax paid. That is the only way in which I can buy gasoline.

Mr. Cobb: That is all.

Redirect Examination

By Mr. Stevens:

Q. Mr. Lockwood, did you engage in the Black Market sales of gasoline during the period of gasoline rationing?

Mr. Pines: We object, your Honor.

Mr. Cobb: We also object on the ground it is incompetent, irrelevant and immaterial.

The Referee: Sure. Objection sustained.

Mr. Stevens: I would like to make a statement.

The Referee: I will not let you ask this man that type of question and have it answered.

Mr. Stevens: All right.

The Referee: If you say he did, then prove it. You have a peculiar idea of how to present a case, it seems to me.

Mr. Stevens: Thank you.

The Referee: You do have a very novel way.

Mr. Stevens: Thank you. [24]

The Referee: The objection is sustained and the witness is directed not to answer that question.

(Testimony of Arlie R. Lockwood.)

Mr. Stevens: All right. Mr. Williams and Mr. Lyles, will you come up here?

Mr. Cobb: Are you finished with this witness?

Mr. Stevens: No, I am not. Your Honor, we feel in view of the testimony of this witness which has been given before your Honor in support of the objections filed by Mr. Lockwood as the Debtor and by Mr. Lynch as Receiver that we should proceed to put on our case.

The Referee: That is what I tried to get you to do an hour ago.

Mr. Stevens: Yes, but I think this is doing it by requiring us to proceed out of order in the presentation of our case. A claim on file is certainly *prima facie* proof, and until it is overcome, makes it a valid claim.

The Referee: Unfortunately for you, I am the presiding man here, and until some higher authority overrules me you will have to do it the way I say you ought to do it. We will take a five-minute recess.

(Short recess.)

Q. (By Mr. Stevens): Mr. Lockwood, on direct examination I believe you testified that you had made no distribution of motor vehicle fuel which was not tax paid? A. That is right.

Q. Do you recall a conversation which you had with [25] Mr. Harold S. Williams, Chief Investigator of the State Board of Equalization for the Motor Fuel License Tax last night? A. Yes.

(Testimony of Arlie R. Lockwood.)

Q. At that time did you not admit to Mr. Williams that you made an unlawful distribution of 792 gallons of motor vehicle fuel as a result of blending 792 gallons of kerosene with a quantity of gasoline in July of 1945?

A. I did not admit that I made an unlawful distribution, no. I admitted there was approximately that many gallons of kerosene in two tanks which I termed empty due to the fact that was all we could pump out with the pumps, and I later on put gasoline on top of those tanks, or in those two tanks. There was some kerosene I couldn't get out unless I got down in the tank and pumped it out entirely dry with a suction pump.

Q. Did you not admit at that time to Mr. Williams that you sold a quantity of gasoline, including that 792 gallons of kerosene?

A. Yes. Of course, if I can explain it so that it would be clear. There were two tanks in which I had had kerosene and which I pumped the kerosene from.

Q. Mr. Lockwood, will you please answer my question yes or no and then qualify your answer?

A. Will you repeat the question please?

(Question read.) [26]

The gasoline was sold from those tanks which naturally would include that kerosene, yes.

Q. Did you admit that to Mr. Williams in your conversation with him?

A. I don't recall that I admitted it, no.

(Testimony of Arlie R. Lockwood.)

Q. Isn't it true, as a matter of fact, that you did sell gasoline which included that 792 gallons of kerosene?

A. Yes, it would be mixed in with the gasoline.

The Referee: Would that make the gasoline better or worse?

Mr. Stevens: It makes him a distributor, your Honor.

The Referee: Would that make it better or worse, Mr. Witness?

The Witness: Well,—

The Referee: Mixing gas with kerosene.

The Witness: As a matter of fact, in this particular instance there is no gasoline. It was pressure appliance fuel used for Coleman Lamps and burners and wouldn't have any effect on the gasoline.

Q. (By Mr. Stevens): But you sold the pressure appliance fuel mixed with this kerosene as motor fuel, did you not?

A. I couldn't help—

Q. Please answer the question. A. Yes.

Mr. Cobb: Counsel asks a long question and then tries to get an answer yes or no without giving the witness a [27] chance to explain. He wants to tell the facts.

The Referee: Let him tell all of the facts. I would like to hear them.

Mr. Stevens: I have no objection to the witness explaining, but I would like to have an answer. What was his last answer—yes?

(Testimony of Arlie R. Lockwood.)

(Answer read as above recorded.)

The Witness: Do you want me to explain?

The Referee: Yes.

The Witness: You see, in the storage tanks the outlet from which you pump the contents is down on the bottom on the side. In other words, it would be on the side of the tank near the bottom. Ordinarily there are several inches between the outlet and the actual bottom of the tank to allow for dirt and water and so forth to accumulate sediment. When we pump those tanks out we can only pump down to that outlet, of course, and the minute that starts sucking air it doesn't get pumped up any longer and we assume the tank is empty then.

Q. (By the Referee): Where does the outlet lead? Can you drain the tank through that outlet?

A. No.

Q. What is the good of an outlet then?

A. Well, it is to enable us to pump products in and out of the tank.

Q. Oh, the outlet is at the top? [28]

A. In other words, we disburse our products out of the pipeline connected to the bottom of the tank through a meter and pump, but when the pump will no longer pick up fluid in the tank, due to the fact it is below or at this outlet, we assume the tank is empty. In this case and in all the tanks I have they have several hundred gallons or maybe a thousand gallons in the bottom that I can't pump out

(Testimony of Arlie R. Lockwood.)

unless I go down in the tank and sop it up with a sponge.

The Referee: All right, sir.

Q. (By Mr. Stevens): Did you report and pay a motor fuel vehicle license tax to the State of California upon these 792 gallons of kerosene which was blended with the pressure appliance fuel?

A. No.

The Referee: What would the tax be on that? Let's get that as we go along so that we have some concrete idea of what the tax bill amounts to.

Mr. Stevens: I can't give you the exact figure on that because there have been some additional—

Mr. Cobb: That is covered by the special assessment which you made in the last few days of \$23.76, counsel.

Mr. Stevens: \$48.95.

Mr. Cobb: The amount of the tax is \$23.76, and 100 per cent penalty is \$23.76.

The Referee: The penalty is how much?

Mr. Cobb: 100 per cent penalty, \$23.76, and interest [29] of 1.43 of \$48.95 evidenced by assessment dated August 6th, but I think it was served here in the last few days. Is that right?

Mr. Stevens: It was served so that the 10-day period for filing a petition for redetermination elapsed on October 18, 1946.

Mr. Pines: I still don't get it straight. When was that served?

The Witness: I might answer that. I received it in the mail I think three or four days ago.

(Testimony of Arlie R. Lockwood.)

Mr. Stevens: The figures of this assessment are contained in the first photostatic copy of the determination attached to Claimant's Exhibit 1 for Identification, your Honor.

The Referee: All right, sir.

Mr. Pines: That gives the date of service, counsel.

Mr. Stevens: Only inferentially. It gives the date when the assessment becomes final, which is 10 days after the date of service. The date that it becomes final is October 18, 1946. It would probably have been received 10 days before that date.

Q. (By Mr. Stevens): Mr. Lockwood, isn't it true that during the months of January, May, June, July and September of 1945, your books and records disclose that you had sold gallons of motor vehicle fuel in the amount set forth in the second photostatic copy of the notice of determination [30] attached to Claimant's Exhibit 1 for Identification?

A. I don't know that it would, no.

Mr. Pines: Just a moment. I wish to object on the ground it calls for a conclusion of the witness. It is not binding upon the Receiver. That is not the proper way of establishing the account. It is a compound question and there is no foundation laid for it.

The Referee: And the further objection that the books themselves are the best evidence, and you have them all right here before you. The objection is sustained. This man testified heretofore before me that he did not keep his books, that he had four

(Testimony of Arlie R. Lockwood.)

or five bookkeepers over a period of a year or a year and a half. Isn't that true?

The Witness: That is correct.

The Referee: Now then I am not going to have him sit here and undertake to tell what are in his books when he didn't keep them. You have the books in your possession. There is a right way to prove these things, my friend. Get the books and prove them.

Q. (By Mr. Stevens): Mr. Lockwood, did you have a conversation in your office in April, on the 22nd of April, 1946, with Mr. Virgil M. Lyles, Supervising Auditor of the State Board of Equalization, Motor Vehicle Fuel License Tax Division, and Harold S. Williams, Chief Investigator of the State Board of Equalization, Motor Vehicle Fuel License Tax Division? [31]

A. Did I have a conversation with him?

Q. Yes.

A. I had so many conversations with him I couldn't recall any date or month or even the conversation.

Q. Do you recall a conversation with those two gentlemen in which you showed them two stacks of rations, what you called them was ration stamps, OPA ration stamps and OPA ration checks?

Mr. Cobb: To which we object on the ground it is irrelevant and immaterial. He could have shown them a bunch of Confederate money and it wouldn't have made any difference.

The Referee: I don't know.

(Testimony of Arlie R. Lockwood.)

Mr. Stevens: I would like to make a statement and offer of proof, if your Honor please.

The Referee: I will hear you.

Mr. Stevens: We will prove that Mr. Lockwood sold a great many more gallons of motor vehicle fuel than his records disclose that he purchased.

The Referee: Do you propose to show that by Mr. Lockwood?

Mr. Stevens: By his testimony, yes. I am going to try to show its relevancy. The major portion of this tax took place in 1945, prior to the end of gasoline rationing. We believe the inference is proper that if Mr. Lockwood was engaging in Black Market fuel operations there would be a [32] tendency on his part not to have his books and records disclose the sources of the gasoline which he sold. We think that if he testifies, as we will show, and we think he will testify that he did engage in those operations, that the inference, when we can find nothing else to explain any reason for the discrepancy, is a proper one.

The Referee: I will tell you right now I am not going out on a limb on inferences. You have got to prove these things to me. I am not going on inferences at all.

Mr. Stevens: In that connection, if the Court please, I would like to point out the fact that so far as the honest taxpayer is concerned his books and records are going to be complete.

The Referee: Have you shown me yet that these records are incomplete?

Mr. Stevens: No, your Honor.

(Testimony of Arlie R. Lockwood.)

The Referee: Then let's get down to that. Let's try this lawsuit like it should be. Get your books. If you have books here, produce them.

Mr. Stevens: Then may I reserve my examination?

The Referee: You have four or five auditors sitting around here, or at your call. Let's put them to work here, have them explain it and have them go over the books.

Mr. Stevens: May it be understood I reserve the right to question Mr. Lockwood further along this line?

The Referee: Certainly. [33]

Mr. Stevens: At a later date in this proceeding?

The Referee: Yes, sir. You can put him on at any time you want, but I am not going to let you prove this case backward. Start at the front end and come on down. Have you any auditors here who have gone over the books?

Mr. Stevens: Surely. I am going to put them on.

The Referee: Let's get to it right quick because I have to leave here at 4:30.

Mr. Stevens: Mr. Lockwood may step down so far as I am concerned.

The Referee: Get the best auditor you have and put him on and let him tell us what he found.

Mr. Stevens: I am going to start at the beginning and show how we got into the case.

The Referee: How who got into the case?

Mr. Stevens: How the State Board of Equalization got into the case. It is relevant, I believe.

The Referee: What has that got to do with it?

Mr. Stevens: I would like to call Mr. Williams to the stand.

The Referee: I assume they got into it because they thought there was some violation of the law; otherwise Mr. Bonelli would not send his high powered staff over here to try the case. Now here is your witness. He is under oath. What do you want to ask him? [34]

HAROLD S. WILLIAMS

recalled as a witness on behalf of the claimant, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination

By Mr. Stevens:

Q. Mr. Williams, did you make an investigation of the manner in which Mr. Lockwood carried on his brokerage business in motor vehicle fuel?

A. Yes. We started an investigation of Mr. Lockwood.

Q. What was the basis upon which you started your investigation?

Mr. Cobb: To which we object on the ground it calls for a conclusion of the witness.

The Referee: That is true, and hearsay—objection sustained. I will let him tell what he found but I will not let him tell what started him on the thing.

Q. (By Mr. Stevens): Mr. Williams, in the fall of 1944 did you receive a report from the Division

(Testimony of Harold S. Williams.)

of Weights and Measures of the Department of Agriculture with respect to motor vehicle fuel being sold by Mr. Lockwood? A. Yes.

Mr. Cobb: To which we object on the ground the letter would be the best evidence.

The Referee: That is true.

The Witness: I have it right here. [35]

The Referee: That would be the best evidence.

Mr. Stevens: I asked if he received a copy. I have not asked what the contents of it were.

The Witness: I did receive a copy.

Q. (By Mr. Stevens): Have you that letter in your possession? A. I have several copies.

Mr. Stevens: I would like to offer these.

Mr. Pines: May we see that before you make your offer.

Mr. Stevens: Yes (handing documents to counsel).

Mr. Pines: We object to the introduction of that evidence, your Honor. There is no connection at all between that document and this debtor.

Mr. Stevens: I would like to have it marked and then I will ask this witness some questions about it which will show its relevancy.

The Referee: Claimant's Exhibit 2 for Identification. How will you prove the authenticity of this thing? It isn't signed by anybody.

(The document was marked Claimant's Exhibit 2 for Identification.)

Mr. Stevens: This is what he said he received.

(Testimony of Harold S. Williams.)

Mr. Cobb: It does not relate to any station we had anything to do with. Even Shell's gasoline is on one of them and we haven't been able to sell any Shell gasoline. [36]

Mr. Stevens: Mr. Cobb is not testifying.

Mr. Pines: Comet Ethyl is one of the brands mentioned and the Comet was involved here. Do you remember it, your Honor?

The Referee: Yes; I had Comet Oil Company here for a few years. If you can hook it up we will hear you.

Q. (By Mr. Stevens): Upon receipt of these enclosures from the Department of Agriculture, what did you do?

A. I called the Supervising Investigator of the Department of Agriculture and discussed them with him, and he told me——

Mr. Cobb: Just a moment now. We object to any conversation with the Department of Agriculture as hearsay.

The Referee: The objection will be sustained unless Mr. Lockwood was there and heard it.

The Witness: Well, that is what started the search.

Mr. Pines: I think it is unimportant as to what started the search anyway.

Q. (By Mr. Stevens): Would you explain, for example, on the first sheet of Claimant's Exhibit 2 for Identification the meaning of the figures that are set forth?

(Testimony of Harold S. Williams.)

Mr. Cobb: We object to any contents of the document until there is a proper foundation laid showing that it has some relevancy as to this matter.

The Referee: I think you are right, sir. I will sustain the objection. [37]

Mr. Stevens: I will offer to prove by this witness that if he were allowed to answer the question he would testify that the form sent to him by the Department of Agriculture and the figures there set forth indicate that the boiling point, required boil-off of all of the gasoline taken in the sample from the debtor Lockwood's gasoline tanks would show that the boiling point was approximately 100 degrees higher than that required by the Bureau of Weights and Measures of the Department of Agriculture for the standard of gasoline.

Mr. Cobb: Just a moment, counsel. You don't mean to say that that document or this witness claims that any of those tests relate to any of Mr. Lockwood's stations?

Mr. Stevens: I certainly do.

Mr. Cobb: It shows right there where it was taken from.

The Referee: Where were those taken from?

The Witness: The samples were taken from storage tanks of service stations Mr. Lockwood purportedly delivered to.

Mr. Cobb: Well now——

The Referee: Oh, my Christian friend.

The Witness: Well, they were taken from storage tanks.

(Testimony of Harold S. Williams.)

The Referee: You say purportedly delivered to. I will hold you down to what you found on Mr. Lockwood's [38] premises. Somebody might have said that Mr. Lockwood killed someone, or that he mixed something with the gasoline to make it look like ethyl.

The Witness: Something started this investigation, Judge.

The Referee: I know, but let's find out what you found after somebody put you on the trail.

Mr. Stevens: Did I understand your Honor to deny our offer of proof?

The Referee: Yes, sir. I deny that offer of proof. I wish you would get down to something germane to this tax question.

Mr. Stevens: Have you any questions to ask?

Mr. Cobb: None.

The Referee: It is immaterial what started it, my friend. Let's find out what they found.

Mr. Stevens: All right. Because your Honor wants to hear one of my auditors testify, at this time, with your Honor's permission, I will put on an auditor, reserving the right to ask Mr. Williams further questions.

The Referee: Yes, sir. I will give you the right to put on any witness you want, providing he knows something about this tax question.

Mr. Stevens: I am calling Mr. Virgil M. [39] Lyles.

VIRGIL M. LYLES

called as a witness on behalf of the claimant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Stevens:

Q. Will you state your name, Mr. Lyles?

A. Virgil M. Lyles, L-y-l-e-s.

Q. What is your official position, Mr. Lyles?

A. Supervising Auditor of the Board of Equalization.

Q. What are the duties required of you in your position?

A. Reviewing gasoline tax audits, assigning work, and occasionally making field audits.

Q. Did you review and audit the returns, the brokerage returns filed by Mr. Lockwood, for the period from January 1, 1945, to and including August 31, 1946?

A. I did.

Q. Did you also review the books and records of Mr. Lockwood for that period?

A. For the year 1945.

Q. For the year 1945 only?

A. That is right.

Q. Will you state what that audit revealed?

Mr. Pines: I object to that as calling for a conclusion.

The Referee: Absolutely. If he has some work sheets [40] taken from the books, I will hear it, but don't ask him for conclusions.

Mr. Stevens: All right, your Honor.

(Testimony of Virgil M. Lyles.)

Q. (By Mr. Stevens): Did you prepare work sheets in making your audit of these books and records? A. I did.

Q. Have you them with you?

A. I have them with me.

Q. Will you get them out, please?

A. Yes, sir.

Q. (By The Referee): These sheets were made by you from the books of Mr. Lockwood?

A. They were made by me or under my supervision, and reviewed by me.

Mr. Cobb: We object to any work sheets prepared by some other auditor.

The Referee: Yes, sir. We have got to have the man who made them. I want the man who made the work sheets. You cannot prove this by a supervising auditor who reviewed something that somebody sent out into the field. It may or may not be accurate.

Mr. Stevens: It is my understanding this was the auditor who made the audit. I was given to understand by Mr. Akers and Mr. Lickter is the one who made the audit.

The Witness: No. You are entirely correct in your assumption that I have made the audit as to all of these [41] sales.

The Referee: Then if this gentleman made the audit, that is keen. That is all we want.

Mr. Stevens: That is my understanding, your Honor.

(Testimony of Virgil M. Lyles.)

The Witness: There are some schedules in here which I merely checked back through the records.

The Referee: I understand Mr. Lyles audited this man's books from January 1st through December 31, 1945.

The Witness: That is right.

Q. (By Mr. Stevens): It was the result of your audit, your particular audit, that the assessment for \$27,799.22 was issued by the State Board of Equalization?

Mr. Cobb: To which we object on the ground it calls for a conclusion.

The Referee: Yes, objection sustained. Ask him what he found.

Q. (By Mr. Stevens): Will you state, Mr. Lyles, from those work sheets the facts upon which you worked and what you found with respect to the motor vehicle fuel distributions and purchases of Mr. Lockwood?

A. Well, in the month of January, 1945, we found an opening inventory of 1,467 gallons, which is the figure reported by Lockwood on his broker's report.

The Referee: 1,467 did you say?

The Witness: 1,467 gallons as his opening inventory, and we were in agreement with him on that figure. We found [42] purchases of 116,314 gallons of motor vehicle fuel, gasoline.

Mr. Pines: That is for what period?

The Witness: That is for the month of January, 1945. That is substantially the figure which Mr.

(Testimony of Virgil M. Lyles.)

Lockwood reported on his broker's report as purchases. It differs by two gallons.

Then we found sales of 122,130 gallons. That is 4,349 gallons greater than the total of the opening inventory and the purchases. That is the basis of the assessment for the month of January, 1945.

The Referee: What was the amount of that assessment in 1945? Do you have it segregated?

The Witness: We do not in our working papers have the amounts of the assessments at all. They are computed at Sacramento.

Mr. Stevens: That item will appear on the second photostat, copy of determination.

The Referee: What is the amount of it? That is all I want to know.

Mr. Stevens: There are a lot of amounts there. Take them off of the first line.

Mr. Cobb: Your Honor, I dislike to interrupt counsel, but there was a conclusion stated by the witness that there were sales of 122,130 gallons. I think he should be asked to explain how he arrived at that determination.

The Referee: You can go into that on cross-examination. [43]

Mr. Cobb: I know, but this may be quite extensive, and we might save a lot of time of the Court, counsel and everybody if we could do it at this time.

The Referee: All right, any way you gentlemen want to do it.

Mr. Cobb: Apparently the audit did not cover

(Testimony of Virgil M. Lyles.)

actual sales, but was based on certain figures from which there was an inference there were sales.

The Referee: Well, I don't know.

Q. (By Mr. Stevens): Will you proceed, Mr. Lyles, month by month to show what you found in the books and records of Mr. Lockwood with respect to his purchases and sales of motor vehicle fuel?

A. In other words, you are now asking for a summary month by month of the purchases and sales?

Q. That is correct.

Mr. Cobb: Tell us what you found and not what somebody else found. You are clear on that? You understand the question?

The Witness: Well, we have the figures for the month of January. Now, Mr. Lockwood obviously made his broker's reports on a basis of book or balancing inventories. In other words, we were not dealing with actual physical inventories. So having sales greater than the opening and purchases for the month, we have to assume that we have no inventory to carry forward at the end of the month to [44] constitute an opening inventory for February.

Mr. Pines: Do the books show the inventory at the start of the month?

The Witness: The books showed an inventory of 549 gallons at the end of January. I will have to correct that——

Mr. Pines: Pardon me a minute. I think it is quite important that we know. The witness has just

(Testimony of Virgil M. Lyles.)

stated he is disregarding the books in so far as what the opening inventory was and has assumed that he sold more, and that he didn't have any left. I think it should be clear he is either testifying to the books themselves, or just what the source of his information is, rather than draw the inference that there wasn't any inventory.

The Referee: I am not going to tax anybody on assumption, I will tell you that right now. You might as well get down to the cold, hard facts.

Q. (By Mr. Stevens): Mr. Lyles, will you state what records you used in arriving at the figures you have?

A. We used Mr. Lockwood's sales record, his sales book, in arriving at our figure of 122,130 gallons. In checking it we found an error in addition, so that the correct addition of his gasoline sales record is 119,230 gallons instead of 117,230, which showed on his progress report.

Q. That is for the month of January, 1945?

A. That is for the month of January, 1945. Now, in [45] addition to that correction of 2,000 gallons in the addition of his gasoline sales record, we found that Mr. Lockwood had a general sales record which showed his sales of commodities other than gasoline. In that general sales record for the month of January, 1945, he had one sale of gasoline for 2,900 gallons, so that we have increased his sales by 4,900 gallons for the month of January, 1945.

The Referee: Let me ask you this now:

Q. I am looking at Claimant's Exhibit 1, this

(Testimony of Virgil M. Lyles.)

photostatic copy you have, January, additional number of gallons distributed 4,349; is that the correct figure? A. That is the correct figure.

Q. On that there is a tax of \$134.47, and 100 per cent penalty, and \$11.74, I guess that is interest—yes, it is interest—a total of \$272.68 tax for the month of January, 1945.

Now the next month on this sheet is May.

A. For the month of May we have an opening inventory of 8,383 gallons. We found purchases of 157,055 gallons, which is in exact agreement with Mr. Lockwood's broker's report. Then we found sales of 236,934 gallons, which is considerably in excess of the quantity reported by Mr. Lockwood.

Q. To what extent? What is the difference?

A. Well, the difference is 95,264 gallons.

Q. More sold than his report showed that he received, is that your statement? [46]

A. More sold than his report shows that he——

Q. That he had bought?

A. Than his sales book footing showed that he sold.

Q. I see.

A. That 95,264 is an increase of sales of 96,234, an error in the footing sales book of a thousand gallons. The total on the sales book was over I stated by a thousand gallons.

Now the sales at which we arrive in our audit, when deducted from the sum of the opening inventory and the purchases, leave a figure of 7,496,

(Testimony of Virgil M. Lyles.)

which is a negative figure, that is, sales in excess of the quantity which he had on hand to sell as far as we were able to determine from the records.

Now we are again in a position where we are working with books, or balancing inventories, and the broker having sold more than he had on hand to sell, we must conclude that he had no closing inventory. That is, that is a figure which we must set up for the purpose of arriving at his total over sales.

Mr. Pines: Do his books and records show an opening inventory for the following month?

Mr. Stevens: Mr. Pines, I object to that. This is not a proper time for cross-examination.

The Referee: That is true.

Mr. Pines: I would like to have an explanation.

Mr. Stevens: I would just as soon like to have him [47] testify and let other counsel ask questions at the proper time.

The Referee: All right, go ahead.

Mr. Stevens: Would it be of any assistance to you to explain the whole system now, or would you prefer to go ahead and tell exactly what you did?

The Referee: I think you would get through a lot quicker if you explained it.

Mr. Stevens: It will be complicated.

Mr. Cobb: He is testifying contrary to the books. The books show an opening inventory and he says he must assume there wasn't one.

The Referee: Let's get along and find out the truth in the easiest and quickest way.

(Testimony of Virgil M. Lyles.)

The Witness: We have to distinguish between books and records on some of these items, and the report, the monthly report made to the State. Now the books themselves do not show a monthly inventory, but on the report submitted to the State for the month of May the closing inventory of 22,634 gallons is shown.

Mr. Pines: Do you have that on your records here?

The Witness: Here is your opening inventory and here are your sales and closing inventory. That again is obviously arrived at simply by a computation from the figures which Mr. Lockwood had used in making his report. In other words, we are dealing with computed inventories, not with actual [48] physical inventories.

Q. (By Mr. Stevens): But your figures are gross sales taken from the sales records of Mr. Lockwood?

A. If by records you include sales invoices—in other words, we found on his sales book recorded sales of 141,670 gallons and we increased that by a figure of 95,264, of which 96,264 represented sales invoices.

Q. Did you check those sales invoices against the sales records as disclosed in a sales book?

A. We did.

Q. Of Mr. Lockwood? A. Yes.

Q. And you only included such sales invoices in your audit as were not also entered in the sales book?

(Testimony of Virgil M. Lyles.)

A. That is right. He had sales invoices for the month of May, and thereafter he had sales invoices for all of the items on his sales book, and he had these additional sales tickets.

Q. (By Mr. Cobb): Were these separated, these additional sales tickets that were different from those in the books; were they separated or were they mixed up?

A. They were for the most part separated.

Q. (By Mr. Stevens): What do you mean by separated?

A. I mean that we did not find them in the same place in which we found the tickets that were entered on the books.

Q. Will you continue to explain what you found in [49] your audit?

A. Now we have the close of the month of May, at which time we show no inventory to carry forward, and Mr. Lockwood's monthly report shows 22,634 gallons.

In the month of June we find purchases totaling 122,278 gallons.

Q. (By Mr. Cobb): May I ask the witness whom he means by "we found"? Did you find it or did someone else find it? A. I found it.

Q. You said "we."

A. The sales were in the amount of 338,817 gallons as against—well, as far as the monthly report for the month of June is concerned, apparently none was filed with Sacramento, so to some extent we were on our own on these figures for the month

(Testimony of Virgil M. Lyles.)

of June. Our sales were 338,817 gallons, which was a sale in excess of purchases of 216,539 gallons.

Q. (By Mr. Stevens): By "our sales" you mean the sales which were found from the books and records of Mr. Lockwood?

A. They are the sales which are established by audit. Now for the month of July, since our sales are still in excess of purchases, we start with a beginning inventory of zero. I find purchases of 276,939 gallons, and again no report was received by our office from Mr. Lockwood for that [50] month. We find sales, or I find sales of 366,390 gallons, and we had a closing inventory taken on the 31st of July by our own investigating department which is the first physical inventory we were able to tie down. The sales and the closing inventory exceeded purchases by 138,805 gallons.

Q. (By Mr. Pines): Was that for just one month? A. That was for just one month.

Q. May we have that figure again?

A. July, the excess of sales in closing inventory over purchases was 138,805 gallons.

Q. (By Mr. Stevens): Did you state the inventory as revealed by the investigation of the State Board of Equalization, what that figure was?

A. The inventory was 49,357 gallons.

Q. (By The Referee): Let me ask you right here, how much should he pay on each gallon to the State Board of Equalization, a cent and a half, is that it?

A. He should pay three cents if he were a li-

(Testimony of Virgil M. Lyles.)

censed distributor and reporting and paying his tax on time. The State tax is three cents.

Q. Not being a broker would he have to pay any tax on any gallonage he sold as a broker, or would that be paid by the refiner?

A. If he operated within the scope of his license as a broker he would pay the tax to his vendor when he purchased the gasoline, and would make no payment directly to the State. [51]

The Referee: All right, sir. Thank you. I have paid these taxes so long, but I didn't know who got them or what they did with them when they got them. I was just curious to know.

Mr. Cobb: The manufacturer is supposed to pay the tax on all gasoline.

The Referee: Now we have gotten July. What about September?

The Witness: Well, there again we were not satisfied with the evidence of physical inventory by Mr. Lockwood at the end of August. In other words, it didn't appear that he had taken a physical inventory at the end of August. So it was necessary to combine August and September and come to a figure on gallonage unaccounted for which represented a figure for the two months as a unit rather than one month because we had a physical inventory at the beginning of August and Mr. Lockwood had taken an inventory which we were willing to accept at the end of September. So September covers a period of two months really.

In August we began with an opening inventory

(Testimony of Virgil M. Lyles.)

of 49,354 gallons, and there is a transfer in it to gasoline from pressure appliance fuel, 2,789 gallons, and purchases were 164,081, which is 1,769 gallons greater than reported by Mr. Lockwood, or rather 1,769 gallons less than reported by Mr. Lockwood. There is no means of precisely tying down the figure which he reported, because of the absence of a sales [52] record as such, or purchase records as such. His purchases are only recorded in his check record, his cash disbursement record. But the presumption is that 1,769 gallons, which after all is not particularly important, was the temperature corrections which had been allowed to Mr. Lockwood on his purchases and he took up the gross volume received rather than the scanty aggregate to 60 degrees which is the customary practice.

Q. (By The Referee): Does that gasoline expand very much while it is in the tank?

A. I don't have the coefficient of expansion with me, and of course I wouldn't remember it. It is quite a long table, but it does expand. It is sold by refineries ordinarily on a 60 degree basis so that if you buy gasoline which actually had a temperature of 80 degrees the refinery would actually charge you for perhaps a 1 per cent or more smaller volume than the actual measurement.

We have the opening inventory. We have transferred in the pressure appliance fuel which is a tax paid motor vehicle fuel. We have our purchases of 164,081 gallons. That gives a total to account for for the month of August of 216,224 gallons, and the

(Testimony of Virgil M. Lyles.)

sales were 185,221 gallons, leaving a computed closing inventory of 31,003 gallons. Mr. Lockwood had shown a closing inventory of 48,000 gallons. However, a difference in the inventory would not be material because it would merely be offset when we come to an actual [53] physical inventory at the end of the following month.

We start September with 31,003 gallons in the inventory, and purchases of 46,530 gallons, which again is 405 gallons less than reported by Mr. Lockwood, apparently on temperature corrections again. His sales were 63,084 gallons, and the closing inventory shown on Mr. Lockwood's report and accepted by us was 32,236 gallons, leaving a net oversale for two months of 17,787 gallons. That I believe is the close of our determination on the 1945 matter.

Q. (By Mr. Stevens): Did you have anything to do with making the audit on any of these other notices of determination upon which our claim is based?

A. There was an amended determination for the months of January and May, 1945. I did make the gallonage computations for that.

Q. Will you disclose what your audit revealed on that examination?

A. Well, the whole story on that was, when we made our original audit for the months of January, February, March and April, 1945, we took our sales entirely from Mr. Lockwood's sales book. We found no sales invoices in support of them. After

(Testimony of Virgil M. Lyles.)

the records were brought into Mr. Lynch's office we found then in Mr. Lynch's possession the sales tickets for those four months, and in examination and comparison of the tickets with the records it disclosed an invoice for 5,800 gallons, sales invoice in the month of January, 1945, that [54] had been entered as 5,000 gallons, and that gave rise to the 800 gallon determination for the month of January.

Q. 1945?

A. 1945. An invoice in the month of February for 1,660 gallons had not been entered on the records, and that gave rise to 1,660 gallons revision of the determination for May.

The reason it shows up in May is because in working out the comparison of purchases and sales it did not lead to an actual oversale as far as could be computed from the records until the month of May, but of course the total sales was to and including the month of May, but the increase by 1,660 gallons would show up in that month.

Q. Did you have anything to do with the determination of an additional quantity of 792 gallons for the month of July, 1945, which is set forth in a separate notice of determination?

A. I recommended that determination not alone on the showing of the records, but on Mr. Williams' report that he had been present on the day when the actual blending took place.

Q. That was the occasion of the 792 gallons?

A. That was the occasion of the 792 gallons.

Q. Of kerosene?

(Testimony of Virgil M. Lyles.)

A. And it does appear from the records as well as from Mr. Williams' report that there was a purchase of [55] pressure appliance fuel, which is a motor vehicle fuel, and on the same day when this purchase was received an inventory was taken and there was 792 gallons more on hand than had been purchased.

Q. Of kerosene?

A. Of pressure appliance fuel.

Q. (By The Referee): It was half and half by that time, wasn't it? It was what they call half and half?

A. That was the short of the record, and coupling that with Mr. Williams' report I recommended an assessment on it.

The Referee: That takes you through September.

Q. (By Mr. Stevens): That is all you can testify to as to your own audits, isn't that right?

A. That is all. I did not make the schedules in the other audit. I did not actually check them back to the records to any great extent.

Q. For these other periods?

A. I made a review in the usual way for the period through January of 1946.

Q. Did you make a demand upon Mr. Lockwood to present you with any information explaining the difference between the purchases of motor vehicle fuel as shown by his books and records, and the sales of motor vehicle fuel as shown by his books and records?

A. I did. [56]

(Testimony of Virgil M. Lyles.)

Q. For the period of your audit?

A. I did, yes.

Q. Did he furnish you with any information in this regard?

A. Mr. Lockwood furnished me with records which he said constituted all of his bookkeeping records.

Q. Did they disclose the source? Did they disclose the supplier of this gasoline to Mr. Lockwood, the supplier of an excess, or rather the difference between the total sales and the total purchases?

Mr. Pines: I object to that as being incompetent, irrelevant and immaterial as to who the supplier of the gasoline was.

The Referee: I don't see where that makes any difference. Objection sustained. We won't conduct any Black Market investigation here. We are interested only in taxes.

You are not going to finish today, and it is pretty near 4:20. When do you want to come back again?

(Discussion in re adjournment omitted. The matter was thereupon continued to the hour of 11:00 a.m., October 28, 1946.) [57]

Los Angeles, California, Monday, October 28, 1946
11 a.m.

Mr. Stevens: I would like to continue with Mr. Lyles.

The Referee: Have a seat Mr. Lyles. You are under the same oath you had the other day.

VIRGIL M. LYLES

having been previously duly sworn, resumed the stand and testified further as follows:

Q. (By The Referee): Mr. Lyles, let me ask you this so I can get it clear. These taxes which you have told us about, were they assessed against this man as a distributor of gasoline?

A. As an unlicensed distributor.

Q. What is the difference between them? Is a distributor a man who manufactures gasoline, or is he a man who buys it and resells it?

A. A distributor is one who manufactures or receives motor fuel on which there has been no prior distribution.

Q. Then a broker, as I understand it, does not have to pay that tax. That is paid by the manufacturer of the gas; is that correct?

A. That is right, the manufacturer having paid the tax to the State, passes it on to the broker.

The Referee: All right. Proceed. [58]

Direct Examination
(Resumed)

By Mr. Stevens:

Q. Mr. Lyles, I show you a paper headed State

(Testimony of Virgil M. Lyles.)

Board of Equalization, Sacramento, California, dated December 1, 1944, with the heading, "To all producers and brokers of petroleum products as defined by the Motor Vehicle Fuel License Tax Law, Subject: 1945, Licenses and Records," and ask you if you can identify that paper? A. I can.

Q. What is it?

A. It is a paper which is sent to all licensed brokers and producers of petroleum during the month of December each year advising them to renew their license prior to January 1 of the following calendar year, and containing instructions for keeping records.

Mr. Stevens: I would like to offer this into evidence, your Honor.

Mr. Pines: We object on the ground there has been no showing that that document was sent to this particular debtor.

The Referee: Objection sustained. It might have been sent to every one but him.

Q. (By Mr. Stevens): Does this paper represent the instructions, rules and regulations of the Board with respect to the keeping of books and records by brokers under the Motor Vehicle Fuel License Tax Act of the State of California? [59]

A. It summarizes them. It is supplemented by General Order No. 4, also issued by the Board.

Mr. Pines: I have no objection to it going in as instructions of the Board.

Mr. Stevens: That is all I am offering it for.

Mr. Pines: I have no objection to that.

(Testimony of Virgil M. Lyles.)

The Referee: It could not be binding on this man unless you show that he got it.

Mr. Stevens: Mr. Pines said he is willing to let it go in for that purpose.

The Referee: All right. Let's have it.

(The document was marked Claimant's Exhibit No. 1, 10/28/46.)

Q. (By Mr. Stevens): I show you another paper headed "Report of Broker for Petroleum Products," required under the Revenue and Taxation Code, Part 2, Division 2, Section 7307, and ask you if you can identify this paper?

A. I can. This is the form for the monthly report of broker which is made by all brokers of petroleum products.

Mr. Stevens: I offer this solely for the purpose of showing the typical broker's report required by the Board to be filed by brokers of petroleum products within the meaning of the Motor Vehicle Fuel License Tax Act of the State of California.

Mr. Cobb: We object on the ground that it is incompetent, irrelevant, and immaterial. It would not be binding on this [60] debtor as to tax liability, whether he made the report or did not make the report. It isn't the best evidence.

The Referee: I will let it in, Mr. Cobb, with the proviso that they introduce some evidence showing that a copy of this was mailed to this man, otherwise I will disregard it.

(Testimony of Virgil M. Lyles.)

(The document was marked Claimant's Exhibit No. 2, 10/28/46.)

The Referee: Have you any way of knowing, gentlemen, whether or not copies of these documents were sent to Mr. Lockwood?

Mr. Stevens: Only as to the general practice of the Board sending it to them.

The Referee: If you can show me he got one of them, that will be fine.

Mr. Stevens: I would like to have those now, if I may.

Mr. Cobb: What?

Mr. Stevens: The brokers reports.

The Referee: The general custom is all right, but you have to bring it to a fellow's attention.

Q. (By Mr. Stevens): Mr. Lyles, did you dictate a report of your audit findings immediately after the conclusion of your audit of the books and records of Mr. Lockwood for the calendar year 1945?

A. I did as a part of that audit as a matter of fact. [61]

Q. Is it necessary for you to refer to that report in order to refresh your recollection as to the details of that audit?

A. It would be in some cases, I believe.

Q. Will you describe the books and records produced for your inspection and audit by Mr. Lockwood, and by Mr. Lynch, the Receiver?

A. I think I had perhaps best refer to the re-

(Testimony of Virgil M. Lyles.)

port in that connection. There was a check register in which was entered the checks issued during the year against the California Bank, Bell Branch. There was a gasoline sales record written up in the regular course of operations for the months of January, February, March, April and May, 1945. There was a general sales record written up in the regular course of business, that is, a record for commodities other than gasoline, for the period from January 1, 1945, to June 30, 1945. Then there was a general sales record showing sales of all commodities, including gasoline, for a period from July 1, 1945, to December 31, 1945.

Q. Was there any additional gasoline sales record which you found in the books and records of Mr. Lockwood?

Mr. Cobb: We object to that on the ground it calls for a conclusion of the witness. He hasn't finished telling us about all of the records he found.

The Referee: Let's find out what he found. Go right ahead, Mr. Lyles, and tell us what you found, and then we [62] will ask some more questions.

The Witness: Well, there were purchase and sales invoices and miscellaneous correspondence and trucking or transportation tickets and copies of broker's reports for each month of the year with the exception of July.

Q. (By Mr. Stevens): Were there any other books and records found by you?

A. There was also a gasoline sales record writ-

(Testimony of Virgil M. Lyles.)

ten up about March of 1946 for the months of May and June, 1945.

Q. Did Mr. Lockwood have a general ledger for the calendar year 1945?

A. We were never able to find the general ledger.

Q. Did Mr. Lockwood have a purchase record?

A. He had no purchase record.

Q. Did he keep an invoice register?

A. No invoice register.

Q. Did he keep a cash receipts record?

A. The only record of cash receipts were bank deposit slips which did not show the sources of the cash.

Q. From what records did you compute the purchases of motor vehicle fuel made by Mr. Lockwood for each of the first nine months in the calendar year of 1945?

A. I computed them from purchase invoices.

Q. Did you verify these purchases?

A. They were verified by reference to Mr. Lockwood's check register and by the records of the vendors. [63]

Q. Did you examine the books and records of each vendor to see if such vendor had a record of any sales of motor vehicle fuel to Mr. Lockwood other than those evidenced by the purchase invoices delivered to you by Mr. Lockwood?

A. That was done, yes.

Q. Did you find any record of sales of motor vehicle fuel to Mr. Lockwood other than those disclosed by his purchase invoices? A. No.

(Testimony of Virgil M. Lyles.)

Q. Are the purchases found in your audit of the purchase invoices the same as the purchases reported by Mr. Lockwood in the 10 months for which reports were received by the Board in 1945?

A. They are, substantially so.

Q. And the figures which you testified to last Wednesday afternoon represented the total purchases of motor vehicle fuel for the months of January, May, June, July and September, 1945, include all of the purchases disclosed by the books and records produced by Mr. Lockwood for audit in response to your demand for any and all of his records of his purchases of such fuel?

A. They do.

Q. As I understood your testimony last Wednesday afternoon, part of the additional motor vehicle fuel which you found to have been sold by Mr. Lockwood and not reported [64] by him was disclosed by Mr. Lockwood's general sales record and by his gasoline sales record, and the balance was found in sales invoices which represented sales not entered in his general sales record or gasoline sales record, is that true?

A. That is true.

Q. Did you make any attempt to verify the sales represented by the sales invoices not entered in the general sales record or gasoline sales record?

A. I did make such an attempt.

Q. Did you make a cross-check to the records of vendees in your attempt to verify the sales made by Mr. Lockwood during the five months of January, May, June, July and September of 1945?

(Testimony of Virgil M. Lyles.)

A. I did make a cross check to the records of vendees.

Q. What was the result of that cross check?

Mr. Cobb: We object on the ground it calls for a conclusion and is not the best evidence.

The Referee: Oh, I don't know. Where did you check these records, Mr. Lyles? Were they in the possession of the vendees?

The Witness: In the possession of the vendees.

The Referee: I think I will admit it, Mr. Cobb. Objection overruled.

Mr. Stevens: Will you read the question, please?

(Pending question read.)

The Witness: About 80 per cent of the total sales [65] were found to be shown by the records of the vendees.

Q. (By Mr. Stevens): Can you reduce that to gallons, to figures in gallons?

A. Yes, I can reduce that to gallons. For the months of May, June, July, August and September the total sales shown by our audit is 1,190,446 gallons.

The Referee: Is that for five months?

The Witness: For five months.

Mr. Stevens: Or four months?

The Referee: Four or five?

The Witness: May, June, July, August, September, five months.

Mr. Pines: Would you mind repeating the figure again?

The Witness: 1,190,446.

(Testimony of Virgil M. Lyles.)

The Referee: Is that what you found he sold?

The Witness: That was the total sales. Now of that we have cross checked to the records of the vendees 816,645.

Q. (By Mr. Stevens): In other words, you found that the 816,000 gallons figure was shown by the records of the vendees to have been purchased from Mr. Lockwood? A. That is right.

Q. Did you find in existence any cases in which the records of such vendees of the gasoline sold by Mr. Lockwood did not show the purchase?

A. No, we found no such instance.

The Referee: According to my figures here, the [66] difference between 374,271 gallons is the difference between that sold and that which the vendees' records show as having been received.

Q. In other words, Mr. Lyles, he sold 1,190,446 gallons, is that correct? A. Yes.

Q. Now the vendees' records show 816,000, is that right? A. That is right.

Q. That would leave a difference of 374,201 gallons? A. That is right.

Q. Am I safe in assuming that that is unaccounted for as far as his records are concerned?

A. No, sir. That represents sales on which we did not contact the vendees for our careful check.

Q. (By Mr. Stevens): In other words, every vendee that you checked you found that his records showed the purchase represented by the purchase or sale of invoice to that vendee?

A. That is correct.

(Testimony of Virgil M. Lyles.)

Q. Calling your attention to a group of nine papers headed "Report of Broker of Petroleum Products," can you identify those papers? Perhaps I had better show them to counsel before I go further with my questioning (handing documents first to counsel and then to the witness).

A. I can identify these for what they purport to be. However, I cannot say that I have seen them before because [67] they deal with the 1946 audit.

Q. I am sorry. I was showing you the wrong group of audits.

Showing you another group of reports of broker of petroleum products, I will ask you if you can identify this group of reports (handing documents to witness)?

A. Those are reports of monthly broker reports.

Q. For what month?

A. For the months of May, August, September, October, November and December, 1945—copies which were found in Mr. Lockwood's office.

Q. Were these the copies that were used for comparison purposes in making your audit for this year?

A. With the exception of that for the month of May.

Q. Will you explain what you mean by that remark or that qualification?

A. Well, for the month of May we have here an original report signed by Mr. Lockwood, and we have a carbon copy of that original. Now there was found in his office a carbon copy of another report.

(Testimony of Virgil M. Lyles.)

Q. For what month?

A. For the month of May, 1945, and the figures shown on that carbon copy were the ones shown on the report actually filed with the Board of Equalization.

Q. Which report did you use in making your audit, your audit comparison about which you testified last Wednesday? [68]

A. We used the report filed with the Board at Sacramento and not the one shown here.

Q. Were there any other copies of broker's reports than those included in this group of which you saw in the books and records of Mr. Lockwood when you made the audit of his records?

A. There was a copy of a report for each month with the exception of the month of July, each month of the year 1945.

Q. Were reports filed with the State Board of Equalization for all of the months of the calendar year 1945?

A. We found no record of any report having been filed for the month of June or for the month of July, 1945.

Q. You did not find a copy of the report for July among the books and records of Mr. Lockwood? A. We did not.

Q. Did you find a copy of a report for the month of June, 1945, in making your examination of the books and records of Mr. Lockwood?

A. Yes.

(Testimony of Virgil M. Lyles.)

Q. Will you please testify as to what that discloses? A. Yes.

Mr. Stevens: Incidentally, I understand this is all you were able to find in response to the subpoena, Mr. Lynch?

Mr. Lynch: That is all we were able to find.

Mr. Stevens: Do you know where the other copy for [69] the month of June is?

Mr. Lockwood: I assume it was mailed in to Sacramento.

The Witness: I assume you are interested in the figures on motor vehicle fuel?

Mr. Stevens: That is right, only motor vehicle fuel.

Mr. Cobb: What month is this now?

Mr. Stevens: For the month of June, 1945.

The Witness: For the month of June, 1945, the report found in Mr. Lockwood's office showed an opening inventory of 22,634 gallons, purchases of 122,278, total to account for, 144,912 gallons; sales of 217,597 gallons, at which point the figures as to gasoline stopped, although the figures on other commodities are complete.

Q. (By Mr. Stevens): So as disclosed by the incomplete report for June, 1945, which you found among the books and records of Mr. Lockwood, there was a difference between total sales and total purchases of what amount?

A. Of about \$72,000.

Q. In other words, there was an excess of sales over reported purchases in that amount?

(Testimony of Virgil M. Lyles.)

A. Over reported purchases plus opening inventory.

Mr. Stevens: At this time I would like to offer the reports of Broker for Petroleum Products, just identified by Mr. Lyles, in evidence.

Mr. Cobb: To which we object on the ground it is [70] incompetent, irrelevant and immaterial. The only penalty put in the Act for failure to file a report is revocation of a license. It does not give them the right to assess a penalty against a broker such as forms the basis of the claim here.

The Referee: I don't know. I will overrule the objection. It will be admitted as Claimant's Exhibit No. 3.

(The documents were marked Claimant's Exhibit No. 3.)

Q. (By Mr. Stevens): I call your attention, Mr. Lyles, to the copy of a report for the month of May, 1945, which is attached to and made a part of Claimant's Exhibit 3, and particularly to the instructions on the back of that report, and I quote, "Inventories required herein must be actually gauged inventories and not book inventories," and I ask you whether you examined the books and records of Mr. Lockwood for the period from January 1, 1945, to and including December 31, 1945, disclosing that actual gauged inventories had been taken by Mr. Lockwood?

Mr. Cobb: To which we object on the ground it

(Testimony of Virgil M. Lyles.)

calls for a conclusion. How could this witness know whether he gauged it or took it out of a book?

The Referee: The document will speak for itself. It will show that, I assume.

Mr. Stevens: Your Honor, the document says on the first item "Opening Inventory," and there is nothing to indicate whether the opening inventory is a book inventory [71] or an actual gauged inventory. The books and records of this debtor disclose whether or not they were gauged inventories or book inventories.

The Referee: This document, then, does not tell us anything. How can this witness tell us?

Mr. Stevens: Because he made an examination of the books and records.

Mr. Cobb: How would he know from examining the books whether or not they went out and measured the tanks?

The Referee: Would the records disclose whether or not the man gauged it or took it from a book record?

The Witness: Well, first of all we actually in the the Board of Equalization, through its investigating department, took a physical inventory on July 31st, so at that point we have one physical inventory. The records would disclose that no official inventory had been taken prior to that point because the reports were simply balanced out month by month. The total accounted for precisely equalled the total accounted for on the report, which is a practical impossibility.

(Testimony of Virgil M. Lyles.)

Q. (By Mr. Stevens): In other words, there would be a variation of a little spillage and leakage?

A. A variation of a little spillage and leakage.

Q. That would overrun from tanks, and that sort of thing? A. That is correct. [72]

The Referee: All right, sir. Objection overruled. He has already answered the question, I take it.

Mr. Stevens: Yes, but there is one other actual inventory which was taken.

The Referee: Very well.

Q. (By Mr. Stevens): Mr. Lyles, will you tell the Court what that was?

A. Beginning with September 30th, and monthly thereafter, the condition of the report was such that we were willing to accept as a physical inventory the inventory shown thereon because they did show losses and gains and were said to be physical inventories, and we saw no reason not to accept them as such.

The Referee: Didn't they have loss by evaporation?

A. Ordinarily, yes, sir.

Q. If a man gets 10,000 gallons of gas in his tank, wouldn't he lose some of it by evaporation?

A. That is correct, possibly as much as 1 per cent through the summer months.

Q. (By Mr. Stephens): As a matter of fact, the Board allows a certain tolerance for such evaporation, doesn't it?

(Testimony of Virgil M. Lyles.)

A. That is a statement which is very often misunderstood when it is made. It simply comes to this, that if the loss that is shown by a report is in an amount which could reasonably be due to evaporation, we do not question it, but we do not put it in a certain figure there as 1 per cent as [73] loss and adjust some of your other figures to take it up.

Mr. Stevens: That is all I wish to ask this witness at this time, your Honor.

The Referee: All right, sir. Any questions?

Cross-Examination

By Mr. Cobb:

Q. Mr. Lyles, you went out to these different parties where Mr. Lockwood's records indicated he had sold gasoline and you verified the fact that he sold a certain amount of gasoline, is that right?

A. That is right.

Q. The amounts that you were able to verify the sales of were approximately what Mr. Lockwood had reported in his report that he had sold, wasn't it?

A. I don't think, without an examination of my records at least, that that is the case. I think it was more than actually he recorded as sold.

Q. Would you say it exceeded the amount that he reported he sold?

A. That is my recollection.

Q. What did you say the total reported sales of gasoline for the five months were?

(Testimony of Virgil M. Lyles.)

A. The total reported sales of gasoline for the month of May was 136,343 gallons.

Q. Do you have the grand total for the five months? A. No, I don't. [74]

The Referee: I thought you gave it to me as 1,190,446?

The Witness: That was an audited figure and not the recorded figure.

The Referee: All right, sir.

Q. (By Mr. Cobb): In order to save time would you be willing to total those, and after lunch give us the total of the five months' sales?

A. I can give you the figures after lunch.

Q. The total figure? A. Yes.

Mr. Stevens: You understand there were no reports filed with the Board for June and July?

Mr. Cobb: He told us here he found sales totaling one million—taxing, 1,190,466 gallons. He says Mr. Lockwood made reports for sales that were much less than that. I am trying to find out what his total reports were. In the month of May he used a figure—whether Mr. Lockwood reported it or not.

The Witness: I can give you month by month comparison records.

Q. (By Mr. Cobb): All right, Mr. Lyles, we will do it that way.

A. For the month of May, recorded sales 136,343 gallons, cross checked to vendees, 165,502 gallons.

Now of course in the month of June the only

(Testimony of Virgil M. Lyles.)

figure we [75] can give you is the figure from the incomplete report found in Mr. Lockwood's office which was not filed with the Board. That showed 217,597 gallons. We cross checked 260,505 gallons.

For the month of July no report was made by the broker.

Q. How much do you find was sold to vendees in July?

A. We found 274,951. August, reported sales were 170,155 gallons. We checked through the vendees and got 108,622.

For the month of September we were only attempting to cross check certain unrecorded sales so that we only checked 7,065 gallons for the month of September.

Q. In August you found the vendees' sales were approximately 65,000 gallons under the reported sales, while in July you found an overage there of approximately the same figure, is that right?

A. In the month of July the broker did not report.

Q. These sales would vary in accordance with the time that they were entered upon the records during the first day of the month and the last day of the month, would they not?

A. I don't know that I follow your question there exactly.

Q. What date did you consider was the closing day of the month, and when was the sale consummated for the [76] purpose of your investigation?

A. The sale was consummated at any time dur-

(Testimony of Virgil M. Lyles.)

ing the calendar month, including both the first and the last days—I considered it as a sale of that month.

Q. How do you define sale or consummation of a sale?

A. Actual delivery in so far as we have any record of it. If we do not have records of actual deliveries then it has to be an invoice date.

Q. The invoice date might be several days from the delivery date, wouldn't it?

A. That is a possibility. It might affect one month to an appreciable extent, but over a long period of time, however, it would be of no important effect.

Q. Under your assessment you jumped around from month to month, isn't that a fact? In other words, you start the first month in January and then jump to May.

A. That is true, and the effect would have been the same had we carried the entire assessment down to September 30th and made it all as a September assessment.

Q. Then you jump from July to September and exclude August, is that right?

A. No. We take August and September as a unit but——

Q. You found in August that there was 1,769 gallons, or in September that there were less sales than purchases, didn't you?

A. That is an excess of sales over purchases. [77]

Q. Didn't you state the other day that this 1,769

(Testimony of Virgil M. Lyles.)

gallons, which you figured was a small figure, you would just ignore that or something to that effect?

A. Are you speaking of the 17,787 gallons which appears on our tax determination—17,787?

Q. Maybe it is. My notes aren't complete.

A. For the month of September, 1945?

Q. Yes.

A. A physical inventory of the stocks on hand at July 31st had been taken.

Q. Yes.

A. No, August 1st we start with that physical inventory, we add the purchases, and I may say that what we have accomplished in the final analysis is to add purchases for both August and September and deduct—or rather we added that to the opening inventory.

Q. Let's stick to August. You haven't seen fit to average out some other things here.

A. All right.

Q. At the end of the month of August—you had started the month with a physical inventory.

A. That is right.

Q. At the end of the month of August what did you find the situation to be as to sales and as to inventory?

A. We found the sales to be 185,229 gallons, but we were unable to say whether there had been any oversale in [78] August because we did not have a physical inventory at the end of August.

Q. You found sales, though, for 185,000, is that right?

A. That is right.

(Testimony of Virgil M. Lyles.)

Q. You had an inventory of how much to start with?

A. We had an inventory of 49,354 gallons.

Q. You found purchases of how much?

A. Of 164,081 gallons. Before we had that we also found a transfer to gasoline from pressure appliance fuel, 2,789 gallons.

Q. Would that go on or off?

A. That goes on. That is an increase in gasoline stocks.

Q. Then you found an overage in favor of Mr. Lockwood starting September 1st under those figures, didn't you?

A. We found, deducting the sales from those total receipts and opening inventory, that he had a book inventory of 31,003 gallons on hand.

Q. As of what date?

A. As of August 31, 1945. What his actual inventory is we had no means of knowing, or what it was as of that date.

Q. Now, as of September 30th, if gasoline had been sent out, but had not been invoiced, you would have a smaller inventory, and if the sale was not on the records, why, you [79] would have a shortage in sales, wouldn't you?

A. If gasoline had been sent out and we had no record of the sale?

Q. In other words, you did not bill until the next day for gasoline, or for the next week, it wouldn't appear then on the records; you would then charge

(Testimony of Virgil M. Lyles.)

him and tax him for a deficiency there for the month of September, wouldn't you?

A. I think we are going backward on this. If his sales had been understated it would decrease the oversale.

Q. What if gasoline had been invoiced and had not been delivered, how would you treat it that way?

A. Of course, since we had no record of sales other than those invoices, and since the stock would still be on hand in his closing inventory, if it had not been delivered that situation would increase the oversale.

Q. And you would tax it accordingly?

A. That is right.

Q. When you referred to sales all you knew as to whether or not there was a sale is what you found out from the records?

A. What we found from Mr. Lockwood's records and the records of such vendees as we contacted.

Q. The records of the vendees that you contacted did not amount to anywhere near the amount that you taxed him on, though, did it? [80]

A. No, it did not amount to the full amount of our tax determination.

Q. Now, then, assume that one of these delivery slips that you have testified were off in a separate group, was not posted in the ledger, had been written in error, and for that reason it would not be entered in the ledger, would it?

(Testimony of Virgil M. Lyles.)

A. It shouldn't have been entered in the ledger if it had been written in error.

Q. You took all of these delivery slips that you found in a separate group out there and assumed that those were bona fide sales, didn't you?

A. That is right.

Q. Then assume that Mr. Lockwood's truck driver brought in a delivery slip from John Jones, and then the next day Mr. Lockwood went out to collect for that, and assume that he had to give the owner of the service station another sales slip and received the money, and then he brought it in to the bookkeeper, this sales slip that he collected for, and told him to disregard the one that the truck driver took, then you would be taxing him twice for that one delivery of gasoline, wouldn't you?

A. If all of those things happened we would be taxing him twice.

Q. Then if Mr. Lockwood instructed the bookkeeper just to keep these truck drivers' delivery slips where they [81] weren't paid and weren't posted in the book, in a desk drawer, and you came along and figured them all up, why, you would have an overage of the total amount of this unused group of delivery slips, would you?

A. I see no reason to dispute that statement.

Q. Now with respect to the purchase of gasoline, if Mr. Lockwood's records reported from whom he purchased it and you——

Mr. Stevens: I am going to object to any further

(Testimony of Virgil M. Lyles.)

questioning along this line on the ground it is speculative. If Mr. Cobb wants to lay a foundation for asking these questions by an offer of proof, if it relates to alleged facts around which he is posing these hypothetical questions, then I think he should do it that way.

The Referee: I am inclined to agree with you. It is 12 o'clock, gentlemen. I will hear you again at 2.

(Discussion in re adjournment omitted.) [82]

Los Angeles, California

Monday, October 28, 1946—2 P.M.

The Referee: Now we have this Lockwood matter.

Mr. Cobb: Ready.

VIRGIL M. LYLES

having been previously duly sworn, resumed the stand and testified further as follows:

Cross-Examination

(Resumed)

By Mr. Cobb:

Q. Mr. Lyles, when you made a check of the vendees of Mr. Lockwood, did you go to all of the different stations which you understood he had sold gasoline to?

A. We did not contact all of them because we knew that quite a few of them have changed hands or are out of business.

(Testimony of Virgil M. Lyles.)

A. No, because the brokers' report does not show the detail of the purchases and sales, only the total figure. What I saw was the regular audit that our audit staff makes.

Q. In other words, you got an audit of all of the brokers Mr. Lockwood sold to similar to the one you made of his business? A. That is right.

Q. Except you didn't do it personally; someone else [85] did?

A. I didn't do it personally. It was done by auditors assigned by me and the audits were reviewed by me.

Q. And if there was an overage or a shortage in inventory, or something was wrong in their records, that would naturally reflect——

Mr. Stevens: We will object to that as assuming facts not in evidence.

The Referee: Well, that would naturally follow. I don't see any other answer that this man could make. If there was an order this man would reflect it. The objection is sustained.

Q. (By Mr. Cobb): Do you have any report of what amount you charged to brokers?

A. Yes, sir.

Q. How many gallons?

The Referee: Are the sales to brokers included in your figures which go to make up this eight hundred some odd thousand gallons?

A. No; a very small part are; to the extent of some 40,000 gallons, perhaps.

(Testimony of Virgil M. Lyles.)

The Referee: All right.

Q. (By Mr. Cobb): But you, for the purpose of establishing the tax, have not taken this 800,000 gallon figure; you have taken 1,190,000, have you not?

A. Well, the 1,190,000 is the total audit sales for [86] the five months beginning with May, 1945, and ending with September, 1945.

Q. You established the tax on that figure, less purchases that you found Mr. Lockwood had made that you were willing to accept, less the inventory on hand on May 1st, is that right?

A. Less the purchases made during the five months and the inventory on hand on May 1st, and some 2,700 gallons that was transferred to motor vehicle fuel or to gasoline from pressure appliance fuel.

Q. So you don't know in this 1,190,000 gallons how much was sold to brokers in connection with that figure?

A. Yes, I could give you that figure.

Q. Will you give it to me, please?

A. It will require a little computation.

The Referee: Do you need a pencil and paper?

The Witness: I think I have some paper here; 645,723 gallons sold to brokers.

The Referee: Sold to brokers?

A. Yes, sir.

Q. (By Mr. Cobb): Now did you check any of these sales slips that you found in a separate drawer

(Testimony of Virgil M. Lyles.)

of the desk, I believe you described it, with the delivery records of the particular station or broker to determine whether or not the gasoline represented by that sales slip was delivered to the station and paid for by the station? [87]

A. The total sales to each of these brokers as shown by the audit of that broker—in other words, as shown in his audit purchases, are in agreement with the figure shown in the audit of sales.

Q. Would you read the question again, please?

(Question read.)

Mr. Cobb: Am I confusing you?

Q. As I understand it, you went down to Mr. Lockwood's and you found there were certain sales slips in the drawer of his desk that were not found in his ledger, is that right?

A. I don't believe I have previously said so, but that is right.

Q. And you took those slips and computed the number of gallons of gasoline represented by the sales slips and used that as one of the bases for establishing the tax here? A. That is right.

Q. Now those sales slips that you found in the drawer of the desk showed deliveries to certain vendees, did they not? A. Yes, sir.

Q. Now, did you check the deliveries as shown by those sales slips with the vendees' records to see whether or not the gasoline was delivered and paid for by the vendees?

(Testimony of Virgil M. Lyles.)

A. I checked them in part; I did not check all of them.

Q. Can you tell me one that you found in the drawer [88] that was delivered to a station and paid for by the station and showed on the vendee's records?

A. Well, the sales to Rubin's Service.

Q. All right. What is that address?

A. That is on Beverly Boulevard; I don't know that I have a list of those addresses with me. It is near Vermont on Beverly.

Q. Does he have more than one station?

A. Not to my knowledge. No, I don't have the addresses.

Q. Well, can you tell me of a delivery slip that you found in the desk drawer, give me the number of it and the amount of gallons it represents, and then tell us what you found at the Rubin's Service Station?

A. Under date of May 2nd, Sales Ticket No. 4043 for 2,094 gallons, that was a sales ticket found in the desk, to which you refer. I have here Check No. 1816 of Rubin's Service for \$303.63, and the notation which was on the margin of that check is "2,094 gallons," and the date of the check is May 7, 1945.

Q. May 7th? A. Yes, sir.

Q. And the delivery slip was dated May 2nd?

A. That is right.

Mr. Cobb: All right.

Q. Now did you find another one? [89]

(Testimony of Virgil M. Lyles.)

A. Well, we might as well stay with the same customer. On May 11th we have a sales ticket, Ticket No. 2900 for 1,200 gallons, and on May 14th, Check No. 1821, with the notation "1,200" on the margin.

Q. May 14th, the check was for how much?

A. \$174.

Q. Now on that did you find that these two checks were posted on the ledger of Mr. Lockwood's books?

A. Mr. Lockwood had no cash receipt record through which we could trace his receipts.

Q. I thought you stated this morning he had deposit slips?

A. He had deposit slips, but they showed no source as to the total of the checks.

Q. Did these deposit slips show this amount going into his bank account about that time?

A. I could not say at the present time whether they did or not. I got these checks long after we completed the work at Mr. Lockwood's office.

Q. Did you check his general ledger to see if he had invoiced these particular parties of this amount of gasoline?

A. We were never able to find that he had a general ledger during 1945.

Mr. Cobb: Will you please read the question?

(Question read.) [90]

Mr. Cobb: Strike out "general ledger."

(Testimony of Virgil M. Lyles.)

Q. You found invoices out there in his records, didn't you? A. Yes, sir.

Q. Did you check to see if this Rubin's Station was invoiced for this amount of gasoline represented by these checks?

A. That was the occasion for being at Rubin's Station in the first instance. We had found sales tickets in Lockwood's office made out to Rubin's Station, and we had not found them under his sales book.

Q. Well, you know what an invoice is, don't you? A. Yes, sir.

Q. Did Mr. Lockwood send out invoices where gasoline was not paid for cash on delivery?

A. I presume that was his practice, I don't know whether it was or not.

Q. You found invoices there in his place of business, did you? A. Yes, sir.

Q. Did you check the invoices to see whether or not invoices were sent on these two particular shipments of gasoline?

A. There was no record which would have shown us the information.

Q. You didn't look for an invoice to the [91] Rubin's Service Station on or about that day?

A. We found an invoice to the Rubin's Service Station. That was exactly why we were checking.

Q. You found not only a delivery slip but you found an invoice in Mr. Lockwood's office covering these two shipments of gasoline to Rubin's Service Station?

(Testimony of Virgil M. Lyles.)

A. There is no distinction as far as I can see between Mr. Lockwood's invoices and his delivery tickets. I don't believe he even uses a delivery ticket.

Q. Do you have copies of any of those invoices or delivery tickets in court?

A. No. They are not under subpoena.

Q. When the gasoline is delivered by a driver to Rubin's Service Station, what type of document was given the operator of that station?

A. If anything was given to him at that time, I presume it was an invoice.

Q. If he paid cash for it did you find that a copy of the invoice or delivery slip was given to the operator of the station and the original, receipted for by him, was returned to Mr. Lockwood's plant? I don't want to confuse you. Will you just tell us how they handled that and what documents they used? I am not trying to catch you on a trick question.

A. I understand that. The practice appears to have been to leave a copy of the invoice with the vendee at the [92] time of delivery and to return a copy to the Lockwood files.

Q. And if the operator at the station paid cash to the driver, how was it handled in Mr. Lockwood's place of business when it was returned?

A. That is a matter that is open to some question because in my belief a great many of the invoices were simply stuck in the desk and not entered in any records whatever.

(Testimony of Virgil M. Lyles.)

Q. Well, those that were entered, tell us the course they took, if you can?

A. Those that were entered were entered on a sales record and we were not able to tie them in with any cash receipt record; there being no cash receipts record.

Q. Then if the truck driver brought in the invoice or delivery slip with the cash, that would apparently go to the bookkeeping department and be entered? A. That is right.

Q. If he didn't pay cash and brought back a delivery slip, how did they handle that situation?

A. That, I think, in view of the condition of their records, was handled by simply holding the invoice until they collected the cash.

Q. Did they carry an accounts receivable account during that interval that they held the delivery slip?

A. There were some accounts receivable carried, but the record was incomplete and the postings as to credit for [93] cash receipts was simply direct entries in the account, not posted from any book of original entry.

Q. Did you find in the sales record whether or not these accounts receivable were posted, or were the sales contracts only the cash sales?

A. The sales records to the extent that sales were recorded appeared to represent both cash and credit sales.

Q. Then what were you able to find in regard to the transactions you say they just held delivery

(Testimony of Virgil M. Lyles.)

slips until they got the cash; where were they posted?

A. If they were entered at all they were entered in the sales books.

Q. Did you find quite a few cases where they didn't enter them in a sales record until they collected them?

A. It is of course very difficult to say when a particular item was entered in the sales record; and I say that apparently they held a number of these tickets for a few days until they collected the cash before they entered them, simply because it seems to me with the sketchy accounts receivable records they had they could not have kept track of the records in any other way.

Q. You used all of the sales you could find represented by the delivery slips and all sales you could find represented on the cash register to compute what you claim was the total gallonage sold by Mr. Lockwood?

A. In the final analysis we used the sales [94] slips because we have found all of the sales on the sales record to be represented by sales slips.

Q. Well, did you make any charges for sales to the accounts that were not represented by sales slips?

A. Yes, sir.

Q. And where did you get the figures for that charge?

A. Well, I can best find those, I think, by referring to some of the memoranda that I have here.

(Testimony of Virgil M. Lyles.)

In the case of George M. Cowey, doing business as Scotty's Service Station, among the records of Mr. Lockwood's, in his office, we found transportation receipts covering six loads of gasoline which had been held by the Thompson Tank Line, a receipt showing receipt from Dependable Oil Company and delivered to Scotty's Service Station. I went to Scotty's Service Station to see what those represented. I found that Scotty had copies of those transportation receipts that he had issued checks to Dependable Oil Company in payment of the gallonage shown on them and it referred to the transportation receipt number on the margin of his check, and he said he did not have the invoices but he had purchased that gasoline. Subsequently when we found the invoices in Mr. Lockwood's desk, we did find three invoices for the same gallonage and the same date as three of those transportation receipts, for I assumed they covered the same sales.

Q. Do you have the check of Scotty's Service Station covering that transaction? [95]

A. I have.

Q. May I see it?

A. They are all in that group; five of them.

Q. Now this check of June 8, 1945, shows Invoice No. 1023 and 1024 and 1025?

A. Yes, sir, which happens to be the same numbers as these transportation receipts.

Q. And that is Mr. Lockwood's invoice number?

A. It is not his invoice number; that is the Thompson Tank Line transportation receipt, they

(Testimony of Virgil M. Lyles.)

being the ones who picked it up at the Dependable Oil Company and hauled it to Scotty's Service Station.

Q. Now this check for \$1,147.50, June 12th, that does not contain any reference to any invoice number, does it? A. No, it does not.

Q. Did you determine where this gasoline came from that is represented by these delivery slips?

A. I can only take those at face value; they say it was received at the Dependable Oil Company by the Thompson Tank Line.

Q. Did you try to ascertain where the gasoline was refined?

A. Not as to that particular gasoline as a separate item. It came out of Mr. Lockwood's storage tanks, as the transportation receipts say, then it would merely become a part of the general question; where the amount of oversold [96] gasoline came from.

Q. Now this Reliable Oil Company, referring to 147, did you determine where that gasoline came from?

A. That, according to Scotty or Mr. Cowey, all six of those loads came from the Dependable Oil Company.

Q. You notice the Thompson Tank Line shows it came from Reliable Oil Company?

A. That is true as to that ticket.

Q. That one ticket represents 4,500 gallons, does it not? A. It does.

(Testimony of Virgil M. Lyles.)

Q. So all you are going on is the word of Mr. Cowey or someone that that gasoline came from Mr. Lockwood's tanks?

A. Plus the fact that these others show Dependable Oil Company and Reliable in the one case is not too much of a——

Q. Well, you notice the other one was delivered on the 9th, and this one we call your attention to was delivered on the 18th; that is nine days difference in time, isn't it?

A. That is right. If that is the 18th and not the 8th.

Q. Then the fact that Mr. Cowey told you the one was received from the Reliable Oil Company, and it came from the Dependable Oil Company, you took that as evidence of 4,500 gallons sales, did [97] you?

A. This check refers specifically to that transportation receipt number and this is a check to Dependable Oil Company.

Q. But all that you have are these documents here and what Mr. Cowey told you, is that right?

A. That is right.

Q. Now then, the last check refers to Invoice 1861 and 1862; Mr. Cowey payable to Dependable Oil Company; now that is represented by two invoices from Dependable Oil Company to Scotty's Service Station?

A. That is right. And those are for 2,900 gallons each, and 2,900 gallons is the capacity of Mr. Lockwood's tank.

(Testimony of Virgil M. Lyles.)

Q. And on that delivery you don't have any sales delivery slips; you have an invoice, isn't that right?

A. That is the invoice form; it is the only form we have set up in our sales; we have set up nothing which could be called simply a delivery receipt.

Q. Did I understand you to testify a few moments ago that you didn't find any invoice given or sent by Mr. Lockwood to vendees; that they always used delivery slips; is that what you meant to say?

A. What I meant to say was that he has no delivery ticket as such; he has only an invoice form.

Q. Now let's get this straight: This document here is not a delivery sales slip, that is given by the driver to [98] the vendee, is it?

A. Well, then, we have no delivery slips included in our audit. This is what we have.

Q. Well, whether it is in your audit or not, if you will try to help me get this point clear: When the driver delivered to the vendee gasoline, I understood you to say he delivered to the vendee a copy of the delivery slip and that he brought another copy back to Mr. Lockwood, is that right?

A. You are carrying me beyond the scope of my personal knowledge.

Q. That is the whole thing and what I want to bring out. You are not in a position to testify definitely how this was handled, are you?

A. I am not in a position to testify whether the driver at the delivery of gasoline left this invoice

(Testimony of Virgil M. Lyles.)

or whether Mr. Lockwood or someone else delivered it or mailed it later.

The Referee: 1,200 gallons at \$174, at 14½ cents a gallon; is that the regular price of gasoline at this time?

A. The price ranged from 12 cents to 15 cents.

Q. It did?

A. Yes, sir. This was a wholesaler.

Q. The customer would pay 4½ cents tax, wouldn't he? If I drive in and try to buy some of this gas I would have to pay 4½ cents tax, that would make 19 cents? [99]

A. Well, the tax is presumed to be included in this price.

Q. (By Mr. Cobb): The service station operator usually has a commission of 3½ to 4 cents, doesn't he? A. That is right.

The Referee: They always make me pay the 4½ cent tax. Am I to understand that the refiner pays the 4½ cents and then I come in and pay another?

Mr. Cobb: You reimburse the gasoline station who in turn paid it to the refiner.

Q. (By Mr. Cobb): Now, the State Board of Equalization has quite an organization that checks the refiners of crude oil to determine how much they refine each month?

A. They have, they have such an organization.

Q. And for all gasoline refined you insist that the refiner pay the State 3 cents a gallon?

A. That is not quite an accurate statement. As to oil that is refined and sold or used.

(Testimony of Virgil M. Lyles.)

Q. For consumption in California?

A. Yes, sir.

Q. Now when you started to investigate Mr. Lockwood did the thought occur to you how he could acquire gasoline from any refinery without paying a tax for it?

A. I am tempted to give an indirect answer to that by saying I would not have been working on the case for months and months if I had not been concerned with where he [100] got it.

Q. Well, if he got it from a refinery, wouldn't it be assumed that the refinery paid the tax to the State?

A. If he got it from a refinery and that refinery had not paid the tax to the State, I think I can say the State Board of Equalization would see that he did.

Q. And the refineries are required to have up a large bond, and they have to pay the tax every week?

A. Those who report and pay tax on a regular basis have a bond of approximately twice the amount of their distribution.

Q. And if you found the refinery had sold the gasoline to Lockwood that Lockwood sold to Rubin's Station, that refinery would be liable for the tax, wouldn't it?

A. Let me say that the refinery who sold the particular gasoline, assuming a refinery sold it, represented by Mr. Rubin's purchases, may very well

(Testimony of Virgil M. Lyles.)

have reported and paid the tax on that particular gasoline. It is the oversales we are concerned with, and it is practically impossible to say where those oversales went to. Sales representing the overage.

Q. So it is not any particular sales that you charge Mr. Lockwood with having made, a certain tank load of gasoline and not having paid the tax or bought it from someone who paid the tax?

A. It is not a particular load; it is the [101] excess of sales over purchases and opening inventory.

Q. And did you rely on his records or lack of records to arrive at the figure, is that it?

A. I rely on such records as we found.

Q. Which you summarized by saying they are quite incomplete and not well kept records, is that it?

A. That would be an accurate statement, whether I made it or not.

Q. Now you have been unable to find where any of this gasoline, six million gallons of gasoline he handled, was acquired by him without having paid the tax on it or bought it from someone who did pay the tax on it?

A. We have been unable to find any specific instance in which he received gasoline without paying the tax on it.

Q. And has considerable effort been made to determine whether there was any such gasoline available in Southern California that anyone could buy without paying the tax on it?

(Testimony of Virgil M. Lyles.)

A. During the year 1945 I believe that particular work took a large part of our investigating department.

Q. How many men are in your investigating department?

A. About a half a dozen, roughly. I would have to refer to Mr. Harold Williams for that.

Q. And they were unable to find one load of gasoline that went to Mr. Lockwood's plant that didn't come from a refinery who was paying the tax to California? [102]

A. That is true, I think. I know of no instance in which they found a load on which the tax had not been paid.

Mr. Cobb: That is all.

The Referee: Do you have any more witnesses?

Mr. Stevens: I have another auditor.

The Referee: This man is a very capable man.

Mr. Cobb: I agree with you on that.

(Recess.)

Mr. Pines: I would like to ask a question or two.

The Referee: All right.

Cross-Examination

By Mr. Pines:

Q. Mr. Lyles, in making your audit, did you have some discussion with Mr. Lockwood in respect to his books and records? A. Yes, sir.

Q. Did you find he had any knowledge of the books himself?

(Testimony of Virgil M. Lyles.)

A. I was not able to find he had very much knowledge of bookkeeping himself.

Q. Did he make the statement to you that he left those things up to the employees, or hired help?

The Referee: That would not relieve him, Mr. Pines.

Mr. Pines: It might with respect to the penalty, your Honor.

The Referee: I have three girls out here and I am responsible for whatever they do. I don't see how that would [103] relieve Mr. Lockwood.

Mr. Stevens: I object to the question on the ground it is immaterial.

The Referee: I was rather of that opinion. However, I will hear it. A fellow comes in here and pays \$40 and my girls give him a receipt for it, and I am responsible.

Q. (By Mr. Pines): Well, is it a fact that during this audit you directed Mr. Lockwood's attention to the fact that his bookkeeper for a portion of the time had actually been drawing money out of the business that was unauthorized, and had been raising the checks?

A. That is not an accurate statement. I asked his office man or clerk if he could give an explanation of why certain checks were entered as of a different amount from what the check was actually made out for and paid, and the clerk brought that question to Mr. Lockwood's attention, as a result of which Mr. Lockwood found certain speculations, I believe.

(Testimony of Virgil M. Lyles.)

Mr. Stevens: I move to strike that last as hearsay.

The Referee: No, I am going to let that in. I find that the more you let a man talk the more you learn. The objection is overruled.

Q. (By Mr. Pines): What was the nature of the activities of this bookkeeper that Mr. Lockwood was surprised to find when you directed his attention to those figures?

Mr. Stevens: May it be understood that I am objecting [104] to all of these questions.

The Referee: Yes, the same ruling. What was the question?

Q. (By Mr. Pines): What was is that Mr. Lockwood's attention was directed to as a result of your findings on the drawings of this bookkeeper?

A. I don't know that I exactly follow that question. I asked him why certain checks had been made out and paid by the bank for amounts which differed from the amounts entered on the check register, and beyond that point I think it was more or less in Mr. Lockwood's hands. It developed that a man was merely an employee and the differences had nothing to do with my audit, so I dropped it.

Q. Did you direct Mr. Lockwood's attention, or cause to be directed Mr. Lockwood's attention to the fact that this bookkeeper had been entering his compensation at one sum and making out checks for another sum?

A. I directed his attention to the fact that those

(Testimony of Virgil M. Lyles.)

differences between the checks and the book entries existed.

Mr. Pines: I think that is all.

The Referee: Would the checks be in larger sums than the book entries?

A. They were, yes, sir.

The Referee: Any other questions? Thank you, and you may stand aside.

Mr. Stevens: I have some [105] cross-examination.

The Referee: Oh, my goodness.

Mr. Stevens: Or redirect, I mean.

The Referee: All right.

Redirect Examination

By Mr. Stevens:

Q. You testified on cross-examination to the figures reported as sales by Mr. Lockwood for the months of May, June, August and September, and I will correct that; for the months of May, August and September, and the amounts are shown on the uncompleted broker's reports to Lockwood, which was not filed with the Board, and you also testified as to the number of sales which you cross-checked to vendees' records for the months of May, June, July, August and September, 1945; now, I am going to ask you how many gallons cross-checked by you for the month of May, 1945, were sales shown by the sales invoices contained in the separate drawer to which Mr. Cobb has referred?

(Testimony of Virgil M. Lyles.)

A. The answer is 30,028 gallons.

Q. Out of a total of how many gallons for that month, as shown by the sales invoices in that drawer?

A. 96,264 gallons.

Q. Now for the month of June?

A. For the month of June?

Q. You testified you cross-checked 260,505 gallons of gasoline to vendees' records; of that amount how many gallons represented sales as shown by sales invoices in this [106] separate drawer?

A. That would be 70,925 gallons on invoices not entered on his books or cross-checked.

Q. Now, will you explain how many of the unrecorded sales as shown by these sales invoices were verified by a cross-check to vendees' records for the month of July, 1945?

A. For the month of July of the 51,450 gallons additional sales tickets found—wait a minute—of the 60,020 gallons of sales tickets found, I cross-checked 19,050; that is not the entire figure cross-checked, but it is the quantity of those tickets found in the drawer that were cross-checked.

Q. And for the month of August what was that figure?

A. 6,600 gallons in tickets were found; 2,900 cross-checked.

Q. That is tickets that were in this separate drawer?

A. That is right.

Q. And the reason you were unable to check on the balance of the gallonage was because you were unable to find the vendees?

(Testimony of Virgil M. Lyles.)

A. In a great many instances there was a station that had changed hands, and if you go out to one of them you find a new operator, and there is some question in my mind as to whether or not the State is justified in spending an unlimited amount of time in rectifying the broker's own mistake.

Q. Also you were asked on cross-examination whether [107] or not you did not jump from January to May and from July to September in making your audit. Isn't it a fact that you made a continuous month by month audit for the entire period?

A. The computation of the oversales as shown in this audit is a continuous computation and we might have shown the entire amount of the oversales in the month of September and the results would have been no different except as to the amount of entries.

Q. But you did not arbitrarily jump from the month of January looking to the month of May, and from looking at the month of July to the middle of September? A. No.

Q. Upon my direct examination this morning you testified that there were two gasoline sales records for the month of May, 1945, one of which was prepared in March, 1946, and the other which apparently was prepared in the ordinary course of business? A. That is right.

Q. Will you explain or will you state where you found these—where you found this gasoline sales record for the month of May, 1945, which was not the same—entries of which were not the same hand-

(Testimony of Virgil M. Lyles.)

writing as those for the months of January, February, March and April of 1945?

A. That was found in Mr. Lockwood's desk.

Q. In the same place where you found these other sales invoices [108]

A. That is right. It was just in the form of three looseleaf sheets which were of the same type as had been used in the regular sales record, but they had been removed apparently from the binder and put in the desk.

Q. In the testimony which you gave on cross-examination you used the terms "sales invoice and delivery ticket" interchangeably, did you not?

A. Yes, sir.

Q. And Mr. Cobb questioned you on the taxability of sales by a refinery of gasoline on his cross-examination; would you state what records were required to be turned in to the State Board of Equalization by a refinery who also engaged in the sales of motor vehicle fuel to the State Board of Equalization during the period of gasoline rationing?

A. The records require it to be turned in to the Board would be a periodical report, which might be either weekly, or monthly, but ordinarily is a monthly report, showing the total sales and use of gasoline, and that portion of the total sales and use which is exempt for taxation, including such items as non-highway use and import sales and inventory which shows the total inventory on hand at the beginning of the month, the quantities manufactured or received and quantities sold or other-

(Testimony of Virgil M. Lyles.)

wise disposed of, and the closing inventory. Of course, when we come to audit the distribution, which is the refinery, we get detailed information as to purchases and sales. [109]

Q. During the period of gas rationing was any supplemental report filed with the State Board of Equalization?

A. During the period of rationing there was, I believe, an extra copy of the distributors' reports submitted to the State Board of Equalization, and there was a report to the OPA. The two of them being checked in the office of the Board of Equalization to see if they agreed and then forwarded to the OPA.

Q. Forwarded by the State Board of Equalization to the OPA? A. That is right.

Q. No, if Mr. Lockwood had been able to show you when you made your audit of his books and records, the source of the total number of gallons which his records showed he had sold, would you have proceeded to collect the tax then from the vendor of that gasoline to Mr. Lockwood?

Mr. Cobb: Object to that on the ground it calls for a conclusion.

The Referee: I think so.

Mr. Stevens: It is the same question that counsel asked.

The Referee: Well, "presumed"—I will sustain the objection. If he had known of any violation he would have gone after it. The question is did he sell all of this stuff and did he pay the tax, not

(Testimony of Virgil M. Lyles.)

what this gentleman might have [110] done if he heard someone violated the law. I don't see much use in going over this. You are just telling the story twice. You asked him certain things this morning and I remember what he said.

Mr. Stevens: Your Honor, what I am attempting to do is to go into matters which Mr. Cobb went into on cross-examination and was permitted to do so by your Honor.

The Referee: Well, twice told tales are sometimes effective, but I can remember things for 24 hours, and I remember what this gentleman said this morning. Now, if you have something new I will be interested in it.

Mr. Stevens: I have no further questions at this time.

The Referee: All right. That is all. Now, you have another witness?

Mr. Stevens: I do have one matter further. I am sorry to call this witness back.

The Referee: All right.

Q. (By Mr. Stevens): In Claimant's Exhibit 3, just to make the record clear, can you identify this white sheet dated 7-31-45, and signed C. N. Wakefield and witnessed by H. S. Williams?

A. That is a copy of the physical inventory taken by Mr. Williams and Mr. Wakefield; a copy of which was furnished to me at the time of Lockwood's stock on hand on July 31, 1945. [111]

Q. That is one to which you have referred in your testimony?

A. That is right.

Mr. Stevens: I would like to call Mr. Mark Lickter to the stand.

The Referee: All right.

MARK LICKTER

called as a witness on behalf of the claimant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Stevens:

Q. By whom are you employed?

A. By the State Board of Equalization.

Q. What is your position?

A. Auditor in the brokers' department of the Division of Motor Vehicle Fuel Tax Department.

Q. How long have you been engaged in that work? A. In this particular department?

Q. Yes. A. About 10 years, I guess.

Q. As an auditor? A. Yes, as an auditor.

Q. Did you make an audit of the books and records of Arlie Lockwood, the debtor in this proceeding, for the period from January 1, 1946, to and including August 31, 1946?

A. I did. [112]

Q. Have you your work sheets that you used?

A. I have.

Q. You prepared those in making your audit?

A. I did.

Q. And in making your audit did you find any—did you recommend that an additional tax be assessed for the months in that period?

(Testimony of Mark Lickter.)

A. I did.

Q. What are those two months?

A. April and May, 1946.

Q. Let's consider the month of April, 1946. Will you state what your audit disclosed for that month?

A. It disclosed a gain of 20,988 gallons.

Q. Will you go through it and explain in detail just how you arrived at that gain?

A. The report form 19 of Mr. Lockwood's showed sales during that month of 129,457 gallons.

Mr. Cobb: What month?

A. During the month of April. My audit disclosed that they omitted Invoice No. 00120, amounting to 739 gallons; Invoice 00121, amounting to 208 gallons; Invoice No. 03046, amounting to 7,050 gallons; Invoice 03405, amounting to 7,050 gallons; Invoice 03047, amounting to 7,000 gallons.

Q. And that resulted in the overage of gasoline sold as compared to the amount of gasoline to be accounted for as [113] shown by the books and records of the taxpayer?

A. That resulted in a gain of 20,988 gallons.

Q. Explain what you mean by gain, will you?

A. We opened with an inventory of 19,914, which was Mr. Lockwood's closing inventory of March and opening inventory of April, 1946. The purchases agreed with his reported amount, or 116,126 gallons, making a total of 136,040 gallons. Our sales, according to our audit, amounted to 150,560 gallons. The closing physical inventory was 6,468 gallons, making a gain of 20,988 gallons.

(Testimony of Mark Lickter.)

Q. Did you verify the sales covered by the invoices to which you have testified? A. I did.

Q. With records of the vendees?

A. With records of the vendees, yes, sir.

Q. Will you state what you found?

A. I found those invoices, copies of those invoices of the Dependable Oil Company to A. L. Fenton at 2801 West Olympic Boulevard, Los Angeles, Service Station; April 2, 1946, Invoice 03405, 7,050 gallons, substantiated by a hauling ticket from Roberts Tank Line No. 9181, as delivered from Dependable Oil Company to A. L. Fenton. April 2, 1946, Invoice 03406 for 7,050 gallons of gasoline sold to Al Fenton by Dependable Oil Company.

Q. Both the same date?

A. That is right, your Honor. [114]

The Referee: All right.

The Witness: And with the delivery ticket from Roberts Tank Line, No. 9143 for the same amount of gasoline. Pardon me, there was two delivery tickets, 9143 and 9144, and on the second, 00121, Dependable Oil Company sold Al Fenton 208 gallons of gasoline, and on April 2nd again, 00120, Dependable Oil Company sold Al Fenton 739 gallons. I have a cancelled check from Victory Petroleum Agency, doing business as A. L. Fenton, amounting to \$1,568.42, in payment of these invoices. There is also attached a memorandum by Al Fenton's office showing that this gasoline was delivered to four of his stations. Here is another one. I also have an invoice numbered 03407 for

(Testimony of Mark Lickter.)

April 2, 1946, by Dependable Oil Company to Jack Pomeranz, 601 North Vermont, Service Station, for 7,000 gallons, with delivery ticket from Roberts Tank Line, No. 1788, and a cancelled check from Dependable Oil Company dated April 3rd, for \$735.

Q. (By Mr. Stevens): Now, state what you found for the month of May, 1946.

A. For the month of May we found a difference in our audit of 2,900 gallons, a gain of 2,900 gallons.

Q. Would you go through that item by item and state what you found?

A. We found that an error was made in their sales record whereby 2,900 gallons was added to the sales record but was not included in the total in the footing of that [115] record.

Q. And otherwise the figures you found were the same as those reported but for that one error in addition? A. That is right.

Mr. Stevens: That is all.

Cross-Examination

By Mr. Cobb:

Q. Mr. Lickter, this April 2nd sales, did you check the ledger to see if they were posted in any of the ledgers or sales records of the Lockwood Oil Company?

A. They were not. You are referring to April 2nd?

Q. Yes, sir.

A. No, they were not included in the sales record that I checked.

(Testimony of Mark Lickter.)

Q. You checked to see if there were any like figures and amounts posted in the sales record, did you? A. I did.

Q. You did that personally? A. I did.

Q. What records did you make that check on?

A. You mean the sales records?

Q. Any records.

A. On their sales invoices and checked to their sales record.

Q. Well, the sales records at that time consisted of what? [116]

A. It consisted of a sales journal.

Q. And you found no postings in the sales journal that corresponded to these figures?

A. No.

Q. Did you find a record of a sale to the Victory Petroleum Products Company about that date of a similar amount?

A. Well, there were other sales to the Victory Petroleum Company during that month.

Q. Did Mr. Lockwood or the bookkeeper tell you that in respect to these invoices that Mr. Fenton asked him to change the delivery to the Victory, or that the Victory asked them to change it to Fenton? A. No.

Q. Where did you find these sales records covering these April 2nd transactions?

A. They were in Mr. Lynch's office.

Q. Were they in with the other invoices for that period of time?

(Testimony of Mark Lickter.)

A. No, no, Mr. Smith of Mr. Lynch's office handed me those invoices. He said he had found them in Mr. Lockwood's safe.

Q. What did you do after he handed you those invoices?

A. I entered them in my audit, included them in my audit and checked the sales record to see if they were included in that. [117]

Q. Did you just look under the name A. L. Fenton?

A. No, I knew Fenton was doing business as Victory Oil Company.

Q. But you did find sales in the month of April by Mr. Lockwood to Victory Oil Company?

A. Yes.

Q. And you found sales that were entered to A. L. Fenton also? A. That is right.

Q. Now, there was no verification for these starting and closing inventories for the months of April and May; you just took the figure that was filed on the broker's report, you took that?

A. Well, the month of May opened with a physical inventory that was taken by our investigating department.

Q. How much did they open with?

A. They closed the month of April with the amount of 6,468 gallons.

Q. How did you handle in connection with the inventory, the gasoline tanks at Mr. Lockwood's service station?

A. We didn't take that into consideration at all.

(Testimony of Mark Lickter.)

That was his retail business. We were checking his wholesale business.

Q. You knew he had a couple or three service stations, did you not? A. Yes, sir. [118]

Q. And those service stations on those dates had gasoline in their tanks? A. True; it might be.

Q. And you never took the amount that was in those tanks into consideration in connection with this figure you have given here?

A. No. I asked Mr. Lockwood if he had records of those service stations and he said he had none, so there was no way to check them.

Q. I will show you what purports to be a ledger of Mr. Lockwood's for the month of April, 1946; there is an entry to Al Fenton of \$1,829.90; did you see that record of sales?

A. I believe that refers to another sale he made.

Q. Cannot you tell?

A. Yes, if I checked the records; the total of this check is \$1,568.42.

Q. Then you had a supplemental check of gal-lonage for 208 or something?

A. That is all included in that check.

Q. Did you have any other sales records for this same period of time? A. No.

Q. If you are familiar with this book you can save me some time. Will you turn over to the record of accounts receivable under the name of Fenton or Victory Petroleum. [119]

Mr. Stevens: Mr. Lickter, don't you have in

(Testimony of Mark Lickter.)

your audit working papers a schedule of all of the sales to Al Fenton and Victory?

A. Yes, I think I have.

Mr. Stevens: I think if we could get that we can then compare that with what you found and the item Mr. Cobb is questioning on. In your working sheets you have the dates and so forth.

The Witness: Yes, everything is right here.

Q. (By Mr. Cobb): This check was put in the California Bank to the credit of Dependable Oil Company, was it not? A. Yes, sir.

Q. Well, doesn't this ledger show on that date the receipt for that sum of money? Can you help me here on the cash journal to show that?

A. That was on the 3rd of April; there is nothing there.

Q. You are looking at January?

A. That's right.

Q. February is the last entry in there?

A. Yes, sir.

Q. Do you know whether or not the books were posted up to the month of April, Mr. Lockwood?

Mr. Lockwood: I thought this year's books were complete up to August 31st. I am quite sure there were. There is an accounts receivable book out there, I believe, and also [120] an accounts payable book.

Q. (By Mr. Cobb): Do you know where the bank records are of the Lockwood account here in this book?

(Testimony of Mark Lickter.)

A. No, I don't. I didn't go into that.

Mr. Stevens: You have there a copy of the sales record, don't you? And you also have Mr. Whitaker's audit working sheets for that month; can't you compare those two figures?

Mr. Cobb: The only cash record for April, 1946, under Al Fenton, \$1,829.90, is that right?

A. That is right according to that book, but that does not represent these purchases.

Q. It is larger than the total purchases?

A. That is right. That is for other purchases.

Q. Did you check to see some other purchases?

A. I did at Fenton's; also other checks and other invoices.

Q. Did he buy any other merchandise from Mr. Lockwood in that month? A. Yes, sir.

Q. Do you know how much that amounted to?

A. Yes. Al Fenton's total purchases from Lockwood in that month was 42,117 gallons.

Q. Well, what is that in dollars and cents?

A. That I don't know.

Q. Well, didn't you ask him—you got one check for [121] \$1,500, didn't you get checks for his other purchases?

A. No, because those agreed with our sales.

Q. All right. If it agrees, where are the other figures that it agrees with for that month?

A. Where are the other figures?

Q. Yes.

A. Well, it agrees on the other purchases, on both of the amounts here. These are the invoices

(Testimony of Mark Lickter.)

that represent these sales here; all of these other purchases or sales to Fenton—those amounts will agree.

Q. Well, where are the records that you say will agree with Mr. Fenton's records; where are Mr. Lockwood's records?

A. They must be in Mr. Lynch's possession.

Q. Did you use this ledger before you to check with Mr. Fenton's records, or what did you have?

A. No; I had the invoices; in other words, these invoices I have here checked with Mr. Fenton's records.

Q. What you did was to take the invoices to Mr. Fenton; the whole amount and go out and check them with Mr. Fenton's records?

A. That is right.

Q. And Mr. Fenton produced invoices No. 405 and one or two others that you didn't have from Mr. Lockwood, and that is where you discovered, in your opinion, that he didn't have invoices covering it, is that it?

A. He didn't have invoices. [122]

Q. Mr. Lockwood?

A. Yes, I found the invoices in Mr. Lynch's office covering those sales.

Q. Then how did you know they were not included on this ledger? May I have this for evidence? The witness testified about it and I want the other bookkeeper to explain the matter later.

The Referee: All right. We will mark it.

(Testimony of Mark Lickter.)

(Papers marked Debtor's Exhibit 1, 10-28-46.)

The Witness: The invoices all had invoice numbers.

Q. (By Mr. Cobb): Well, do you have the invoices that you just finished testifying to for these other sales that you made the assessment against?

A. What assessment was that?

Q. Well, you charged him, I remember on one delivery you said you found the invoices in Mr. Lynch's office and you found Mr. Fenton paid him.

A. Here it is right here.

Mr. Cobb: We will offer that in evidence, your Honor.

The Referee: All right.

(Papers marked Debtor's Exhibit 2, 10-28-46.)

Q. (By Mr. Cobb): Did you have another one?

A. No, that was all.

Q. Just those two? A. That is right.

Mr. Cobb: May I see those last exhibits, Your Honor?

The Referee: Yes, they are right here. I doubt if [123] you will be able to finish this afternoon. I suggest we take a little recess and let you look through those books and see if you can find what you want. Now when would you like to resume this? I can give you any afternoon this week.

Mr. Stevens: We would appreciate it if we can

(Testimony of Mark Lickter.)

finish this week because Mr. Lyles is going on his vacation and has been deferring it until we finish. We have a matter also on Thursday which we want to make a test suit on.

Mr. Cobb: How about Friday?

The Referee: I can give you all day Friday; no I have a case for Referee Laugharn on that day.

Mr. Stevens: Could we make it at 11 o'clock on Friday?

The Referee: Yes. We will start at 11 on Friday; November 1st, 11 o'clock. I will put those two checks together and mark them Debtor's A.

Mr. Cobb: All right. I will give them to your secretary when we have finished with them.

The Referee: All right.

(Whereupon an adjournment was taken until 11 o'clock a.m., Friday, November 1, [124] 1946.)

Friday, November 1, 1946—11 A.M.

The Referee: Well, our Lockwood matter again. You might give your appearances to the reporter.

Mr. Stevens: Daniel N. Stevens, Deputy Attorney General, appearing for Robert W. Kenney, Attorney General of the State of California.

Mr. Cobb: Francis B. Cobb, of Cobb & Utley, appearing for the Debtor.

Mr. Pines: Harry A. Pines of Dechter, Hoyt, Pines & Walsh, appearing for the Receiver, Lynch.

The Referee: Proceed.

Mr. Stevens: Call Mr. Lickter.

MARK K. LICKTER

recalled as a witness on behalf of the Claimant, having been previously duly sworn, resumed the stand and testified further as follows:

Mr. Cobb: May I see the exhibits offered by the Debtor?

Mr. Stevens: May I make the suggestion that since those do involve two separate sets of invoices, one to Pomeranz and one to Al Fenton, that they be marked as separate exhibits rather than just as one?

Mr. Cobb: I think we will be able to explain them.

Mr. Stevens: Could we have them marked separately? They are two different transactions. [125]

The Referee: I will mark them separately.

Cross-Examination

(Resumed)

By Mr. Cobb:

Q. In reference to these deliveries, which are evidenced by Debtor's Exhibit 1, say to Mr. Fenton, as I understand it, you were unable to determine where the gasoline was purchased by Mr. Lockwood, and you assumed it came from his storage tanks?

A. (No response by the witness.)

Q. Is that a fair statement of your position on those items?

A. No. According to the delivery tickets here, it shows that the load was received from Dependable Oil Company and delivered to Mr. Fenton.

(Testimony of Mark Lickter.)

Q. The Dependable Oil Company is Mr. Lockwood? A. That is right.

Q. Do you know whether or not it is customary for a broker, if he has oil delivered to a customer, or gasoline delivered to a customer, direct from the refinery, you still show it as coming from the plant, so the customer wouldn't know where he was buying the gasoline? A. Well, I doubt that.

Q. You doubt it? A. Yes.

Q. You never found that was the practice that Mr. Lockwood followed in his business? [126]

A. Well, I wouldn't say "Yes" or "No" on that.

Q. Now, I show you here a freight bill from the Bell Oil Company, bearing the date of 4-1-46—and it shows the receipt number—delivered to the Roberts Tank Line, and the destination is "A. E. Fenton." Also attached to it is another Roberts Tank Line receipt from the Bell Oil Company, being No. 9142, 9143 and 9144, and a Bell Oil & Refining Company Receipt No. 2507. Will you examine the gallonage, the trucking company to whom they were delivered, and the company to whom they were to be delivered, and see if, in your opinion, it does not cover the same gasoline that has been testified to in connection with Debtor's Exhibit No. 1.

A. Well, I can't seem to identify those pertaining to these loads. They are different drivers.

Q. Is that the only thing you fail to identify?

A. (No response by the witness.)

Q. Let me show you another freight bill, 12314,

(Testimony of Mark Lickter.)

and receipts giving numbers 1787 and 1788. You have looked at that Receipt No. 1788, have you not?

A. Yes.

Q. Will you examine this document, together with 1787, and the gallonage, the destination, and the parties that loaded it, and answer me whether you think that is the same gasoline that is referred to in Debtor's Exhibit 1?

Mr. Stevens: Your Honor, I object to this question on the ground there is no testimony given by this witness as [127] to whether or not in making his audit he checked into these sources, but, on the contrary, his testimony has shown that in making his audit he computed the total sales made during the period as shown by the books and records of the bankrupt, and also computed the total purchases made during that period by the bankrupt, and that he used the resulting difference as the figure which he recommended for the purpose of this assessment. I think he has no knowledge on this question.

The Referee: This is cross-examination. He has a right to find out how he arrived at these conclusions. Objection overruled.

Q. (By Mr. Cobb): In reference to Mr. Fenton's deliveries, are you able to determine whether or not it is the same? A. No, I am not.

Q. Let me ask you this: The Bell Oil Company issued, as shipper, Freight Bill No. 12314 on 4-1-46, did they not?

A. (No response by the witness.)

Q. The destination: "Jack Service, L. A."?

(Testimony of Mark Lickter.)

A. That is right.

Q. And that was covered by Receipts 1787 and 1788? Is that right?

A. According to what they show here, it is, yes.

Q. And that represented 7,000 gallons of gasoline?

A. That is right.

Q. Shipped in Truck No. L-12 and Trailer No. L-13? Is that right? [128]

A. Yes.

Q. Now, we have Debtor's Exhibit 1, which you produced, a receipt from the Roberts Tank Line, No. 1788, do we not?

A. That is right.

Q. And the amount of gasoline represented by that was 7,000 gallons, wasn't it?

A. Yes.

Q. And it was shipped by Truck No. L-12 and Trailer No. L-13?

A. That is right.

The Referee: On the same dates, Mr. Cobb?

Mr. Cobb: Date loaded 4-2-46 on Debtor's Exhibit 1, and the bill of lading is dated 4-2-46. The top of the freight bill bears date 4-11-46. I presume that was the date that it was made out, but the date of shipment, apparently, is the same in both.

Q. (By Mr. Cobb): You wouldn't say that was the same shipment of gasoline that was referred to in Debtor's Exhibit 1?

A. No.

Mr. Cobb: May I have this marked as Debtor's Exhibit next in order, being the shipping receipt—

Mr. Stevens: I object to that on the ground that there has been no showing of the validity of these documents, whether they are documents of the Bell Oil Company. This [129] witness can't identify those.

(Testimony of Mark Lickter.)

The Referee: I will overrule the objection. I want to get to the bottom of this without so many technicalities. I want to find out who owes who and how much. I want to find out what the truth is here. All right. You may have that marked. I don't know what the number is, and we will check it later on.

Q. (By Mr. Cobb): Let us turn to the Roberts Tank Line Receipt 9143, attached to Debtor's Exhibit 1, and let me hand you a freight bill of Bell Oil Company, 12312 and which contains receipt No. 9143, 9142, and 9144. Your exhibit also has attached 9143 and 9144, has it not?

A. (No response by the witness.)

Q. In other words, you have 9143 and 9144?

A. Yes.

Q. The amount of gallonage shown in this freight bill is 7,050 barrels, is it not?

A. No, it is 7,050 gallons.

Q. I mean gallons. Pardon me. It bears date of 4-1, does it not? A. It does.

Q. And this exhibit offered bears date of 4-1, does it not? A. That is right.

Q. And your exhibit bears the signature of Mr. A. Holt, and the attached Roberts Tank Line also bears the [130] signature of A. Holt, as well as another signature? Is that correct?

A. That is right.

Q. Your exhibit doesn't contain 9144 referred to in the exhibit that I have handed you, does it—yes, it does. Pardon me. And that is for 2,800 gallons,

(Testimony of Mark Lickter.)

and this exhibit is 2,800 gallons? Is that right?

A. That is right.

Q. And both of them are signed by Mr. Holt?

A. Yes.

Q. Would you say that is the same gasoline that is referred to in Debtor's Exhibit No. 1?

A. Well, it appears to be the same, yes.

Mr. Cobb: We will offer this as Debtor's Exhibit next in order.

Mr. Stevens: I object to that evidence on the ground that no proper foundation has been laid, no showing as to the validity of those documents or that they come from the records of the Bell Oil Company.

The Referee: Objection overruled. They will be received.

Q. (By Mr. Cobb): In Debtor's Exhibit 1 you have "Roberts Tank Line, No. 9181," made out to the Dependable Oil Company and signed by Mr. Hahn, representing 7,050 gallons? Is that correct?

A. That is right. [131]

Q. Now, I show you Freight Bill 12313 with the notation, "Receipt No. 9180 and 9181," representing 7,050 gallons, to which is attached a breakdown of the gallonage, 2,750 in Truck No. 7 and 4,300 in Truck No. 4-A, and ask you if the gallonage and breakdown and trucks do not compare with your exhibit, Debtor's Exhibit 1?

A. Freight Bill 9180 is not included in this. Freight Bill 9181 is, and it shows a total of 7,050 gallons.

(Testimony of Mark Lickter.)

Q. In other words, under your test and your tax you charged Mr. Lockwood for 7,050 gallons, did you not? A. No.

Q. What gallonage did you charge him for in connection with this Debtor's Exhibit 1 in connection with that transaction?

A. We didn't charge him with anything. I didn't charge him with anything.

Q. Well, you made an assessment on 7,050 gallons, which was delivered to Mr. Fenton, that you didn't find in his records? Wasn't that your testimony?

A. I made an audit showing that difference, yes.

Q. So I have produced 9180 and 9181, while you just produced 9181, didn't you?

A. That is right.

Q. And would you say that as to 9181 that is the same gasoline that is shown in your exhibit?

A. That appears to be about the same. [132]

Q. Why do you say "about"? Isn't it signed by the same men, the same trucks, the same gallonage, and the same date and everything? Isn't that right?

Mr. Stevens: I object to the question, calling for the conclusion of the witness.

The Referee: He is looking at the document. How does it call for a conclusion?

Mr. Stevens: He doesn't know what those documents represent.

The Referee: Overruled. When a man looks at a thing he ought to know what is on it.

(Testimony of Mark Lickter.)

Mr. Stevens: I object, because what he is looking at doesn't say what is on it.

The Referee: That is overruled, too.

The Witness: That seems to be a carbon copy.

Mr. Cobb: At this time we offer Freight Bill 12313 and attached delivery slips as an exhibit next in order.

Mr. Stevens: I object to this evidence for the same reason I objected to the last couple of exhibits.

The Referee: The same ruling. That will be A-3.

Q. (By Mr. Cobb): With respect to this overage, excess sales and purchases, do you have any of the details supporting those overages like you produced in the form of Debtor's Exhibit 1?

A. To give you a reconciliation——

Q. I am not interested in a reconciliation. I asked [133] you before: Do you have any details upon which you based your assessment in 1946, which you produced in your Debtor's Exhibit 1, showing these deliveries to Mr. Fenton and to Mr. Pomeranz?

A. (No response by the witness.)

Q. Now, I want to know if you have any of the other assessments, any of the delivery slips or the receipts from the stations, identifying the particular gasoline which you claim that a tax was not paid on?

A. During what period?

Q. During any period. In other words, I can't take your conclusion in this audit and go and dig up

(Testimony of Mark Lickter.)

the companies to show this gasoline was procured from the Bell Oil Company, unless you tell me or show me some delivery date or consignee, like you did, for example, in Debtor's Exhibit 1.

The Witness: May I, your Honor, see that first exhibit?

Mr. Cobb: Here is Debtor's Exhibit 1, if that is it (handing document to the witness).

The Witness: That is it. No, that is not it.

The Referee: There are three of them (handing documents to the witness). I don't know which one you want. Did you find it?

The Witness: Yes, sir. Thank you.

Q. (By Mr. Cobb): Are you able to answer whether you have any other documents showing any particular delivery that [134] is included on your recommendation for tax assessment?

A. Well, I referred it to this Exhibit No. 1-A here, which shows delivery tickets 1787 and 1788 for 7,000 gallons. That 1787 and 1788 are for two loads of gasoline of 7,000 gallons each.

Q. Who did you say they were delivered to?

A. One supposed to have gone to Fenton, and the other one to Pomeranz, but the——

Q. (Interrupting): I want to know if you have got any other shipment or any other transaction that you have any information on, showing dates of delivery, to whom delivered, or the trucks that delivered it, so that I can go out and dig out the records to explain where the gasoline came from.

A. No, no others.

(Testimony of Mark Lickter.)

Q. Now, the Bell Oil Company, they are a refining company, are they not? A. I believe so.

Q. And they operate in Santa Maria?

A. They used to.

Q. Do you know whether or not they pay taxes on gasoline that they sell from their refinery?

A. I do not.

Q. They are a manufacturer of gasoline in the State of California?

A. I believe so. I have never been out [135] there.

Q. And if they are a manufacturer of gasoline and someone purchases gasoline from them, would you personally assume that the tax would be paid to the State of California on such a purchase?

Mr. Stevens: I object to the question on the ground that it calls for the conclusion of the witness.

The Referee: I think so, Mr. Cobb. We are going into the realm of conjecture now. Objection sustained.

Mr. Cobb: No further cross-examination.

The Referee: All right. Any other questions?

Redirect Examination

By Mr. Stevens:

Q. The Pomeranz and Fenton invoices and cancelled checks, which are included in Debtor's Exhibit 1 and 1-A represent the amount of motor vehicle fuel which you added to the total figure of motor vehicle fuel sold by the debtor because you could not

(Testimony of Mark Lickter.)

find any record of the sales covered by those two transactions in the books and records of the debtor? Is that not true? A. That is true.

Q. Those sales were set up as additional sales for the month of April, 1946? Is that not correct?

A. That is true.

Q. Now, with respect to the month of May, the items which you made in your audit to the total sales reported to have been made of motor vehicle fuel by Mr. Lockwood was the [136] result of an error which you found in the books—the sales records of Mr. Lockwood in the amount of 2,920 gallons of gasoline? Is that true? A. That is right.

Q. So, in that instance you made no search for any additional invoices? A. That is right.

Mr. Stevens: That is all.

Recross-Examination

By Mr. Cobb:

Q. Do I understand that if you find an error in the books, or a man doesn't put something down in his books, you go ahead and assess him three cents a gallon for the transaction, whether or not any gasoline was sold or delivered?

A. No, I don't.

Q. You recommed it?

A. I make my report and submit my audit.

Mr. Cobb: That is all.

(Witness excused.)

The Referee: Have you got another witness?

Mr. Stevens: Yes, I do.

The Referee: Let us have him.

Mr. Stevens: Call Mr. Wakefield. [137]

CLARENCE M. WAKEFIELD

called as a witness on behalf of the Claimant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Stevens:

Q. Mr. Wakefield, by whom are you employed?

A. The State of California.

Q. Your position?

A. Investigator, Fuel Division.

Q. For what department?

A. For the Fuel Division.

Q. For what department?

A. Board of Equalization.

Q. How long have you occupied that position?

A. Oh, approximately 12 years.

Q. Did you take an application for license as a broker of motor vehicle fuel form to Mr. Lockwood in April, 1944?

A. Yes, I did.

Q. I show you a paper here headed: "Office of the State Board of Equalization, Sacramento, California. General Order No. 4. Re: Broker's License and Records," and ask you if you can identify this document?

A. Well, I don't know that I can identify this particular one, but this is one that we include, this type, or a copy, with each application. [138]

Q. Did you take a copy of that form to Mr.

(Testimony of Clarence M. Wakefield.)

Lockwood at the time you took him this application and hand it to him at that time?

A. That is included with the application. We always give them a copy of General Order 4.

Q. Did you give him such a copy?

A. Yes. That was attached to the application.

Q. And accompanying that form was there also attached the additional two sheets attached to the sheet which you have just identified, designated, "Purchase Record," and "Sales Record"?

A. Yes, sir. Those two sheets, with each, comprise part of General Order 4. One shows "Purchase Record," and the other shows "Sales Record."

Q. The form of record which the dealer is required to keep in reporting sales and purchases of gasoline?

A. Yes, general outline how to keep their records.

Mr. Stevens: I would like to offer this as Claimant's next exhibit.

Mr. Cobb: I think it is irrelevant and immaterial. The Act doesn't provide any penalty, except revocation of license. It would have no bearing on the issues in this case, whether he sold gasoline without paying a tax.

The Referee: I don't see how it will do much good or much harm. I will admit it. Claimant's Exhibit 1-A of this date, 1-A, November 1st. All right. You give him the papers [139] for the next question.

Mr. Stevens: That is all.

Mr. Cobb: No cross-examination.

The Referee: All right, Mr. Wakefield. That is all.

(Witness excused.)

The Referee: Any other witnesses?

Mr. Stevens: Yes. I would like to call Mr. Williams.

HAROLD S. WILLIAMS

recalled as a witness on behalf of the Claimant, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination

By Mr. Stevens:

Q. Mr. Williams, did you take an inventory of the motor vehicle fuel, kerosene, stove oil, and Diesel oil in the storage tanks at the bulk plant located at Bell on July 31, 1945?

A. Yes. Investigator Wakefield and myself, accompanied by Mr. Lockwood, took an inventory on that date.

Q. What did you do first in making this inventory?

A. When Mr. Wakefield and I arrived at Mr. Lockwood's plant to take the physical inventory, we asked Mr. Lockwood for his gauging equipment. He said that he had none, that he had never taken a physical inventory of his petroleum products. So, we went to our car and obtained the guage—we proceeded to our car and obtained our gauging equipment. [140] We proceeded to measure—Investiga-

(Testimony of Harold S. Williams.)

tor Wakefield and myself measuring and Mr. Lockwood witnessing the measurements—the various amounts, in inches, in the various storage tanks at the bulk plant, measuring the amount of water, if any, and taking the temperature of the particular petroleum product in each tank.

Q. Did you calculate the net quantities of petroleum products on hand in the various storage tanks?

A. When we asked Mr. Lockwood for a calibration instrument, he said he had none. We thought it was necessary for us to calibrate the tanks, to measure the miscalibration, water, how much was held in each tank. In order to do so, you have to measure the circumference of the tank and to deduct—the average circumference of the tank with a tape, and get the thickness of the steel, and then get the interior diameter, and thus to measure the capacity in inches and fractions thereof. We did this and then were able to ascertain or calculate our gauges of inches into the actual number of gallons, net, at 60 degrees, which we use to calculate petroleum products. We then made a copy of the inventory, which was signed by Mr. Lockwood, Investigator Wakefield, and myself. We gave the duplicate to Mr. Lockwood, which included a tank stripping as quoted on the calibration for him to use when he gauged his tanks in the future. The copy of the inventory I have seen with the broker's monthly reports that are in Receiver Lynch's file. [141]

Q. I will show you a copy of the inventory which

(Testimony of Harold S. Williams.)

is in Claimant's Exhibit 3, the copy of the inventory which Mr. Lyles has previously identified as being the one he used, as representing the physical inventory taken on the close of business July 31, 1945, and ask you if you can identify that?

A. Yes, that is my signature on the bottom of it after Investigator Wakefield's, and Mr. Lockwood's signature is barely perceptible on this copy, but it is there.

Q. What did you find at Mr. Lockwood's plant with respect to instruments for measuring the amount of gasoline or motor vehicle fuel products in the various storage tanks?

Mr. Cobb: It is immaterial.

The Referee: The witness said, "None," said he had no instruments.

Mr. Stevens: I hadn't heard that mentioned, otherwise I wouldn't have gone into that.

The Referee: Best you listen. He just said that less than 10 seconds ago.

Q. (By Mr. Stevens): Will you state what you found with respect to the tank in which you found pressure appliance fuel?

A. Before we gauged each storage tank we asked Mr. Lockwood what the product in each tank was. We came to two different small storage tanks, in which I understood he had pressure appliance fuel. We asked him when he put this [142] product in for sale. He stated he had received his first delivery that day, July 21st, a truck and trailer load. Upon calculating the quantity on hand we found that

(Testimony of Harold S. Williams.)

there was approximately 7,200 gallons—seventy-one or seventy-two hundred gallons. I don't know exactly the figures, without looking at the inventory.

Q. In order to have that correct, will you look at the inventory?

A. 4,380.2 gallons in one tank, and 2,751.7 in the other tank, or a total of 7,831.9 gallons.

Q. Did you have a conversation with Mr. Lockwood with respect to the difference in these two figures?

A. Mr. Lockwood, having told us that he had received a truck and trailer, approximately 6,300 gallons of pressure appliance fuel, we asked him how he accounted for this overage, and he stated that the storage tanks had formerly held kerosene, and there was a considerable quantity of kerosene, which amounted to approximately 800 gallons, in the two tanks, and he had not bothered to pump the kerosene—he just pumped in the tax-paid motor vehicle fuel on top of the kerosene, which is not the usual procedure of anybody in filling storage tanks.

Q. Can you give the exact figure?

A. I have seen the inventory and audit figures. The audit figure was 792 gallons difference.

Q. Mr. Williams, were you in court on Monday when [143] Mr. Cobb asked Mr. Lyles on the stand whether Mr. Lyles knew of any source of gasoline which a broker could obtain except through licensed distributors and refiners?

A. Yes, I remember that.

Q. I am going to ask you that same question:

(Testimony of Harold S. Williams.)

Do you know of any source of gasoline during the period of these audits where a person could obtain gasoline other than from a licensed distributor?

A. Well, we had many cases that we brought to a conclusion——

Mr. Cobb: May I have the question answered, when and where and the party's name?

The Referee: We will get all that.

Mr. Cobb: But not his experience.

Q. (By Mr. Stevens): Answer the question directly? A. Yes.

Q. Will you state your knowledge in that regard?

Mr. Cobb: We object on the ground that his knowledge is ambiguous and uncertain.

The Referee: Mr. Cobb, you opened the door when you asked that question of Mr. Lyles. So, I am going to let this man answer. Objection overruled.

The Witness: Judge, I am not at liberty to tell the name of the individual in any cases unless I had instructions, but I can tell you what cases, what they amounted to, and how they were arrived at. [144]

The Referee: The question is do you know of any source where a person might purchase gasoline other than at a licensed refinery?

A. Yes. I answered it, "Yes."

The Referee: State what those sources were?

The Witness: During the war there were four principal sources, from which many of our cases developed, and which resulted in determinations and

(Testimony of Harold S. Williams.)

assessments for tax collection as unlicensed distribution, the first one being motor vehicle fuel that was sold by licensed distributors, as taxed, to a Federal Government Agency, particularly the Military Department. We worked very closely with the F.B.I., and numerous cases in which stolen gasoline was turned up, and one of the sources of untaxed motor vehicle fuel was available during the war in the State of California, when gasoline was particularly short and was withheld from the motoring public, who were willing to give anything for a couple of gallons extra, that rationing stamps didn't give them. That was source No. 1.

The second source was where gasoline was stolen directly from licensed distributors, through collusion by employees, tank truck drivers and other parties.

The third case was illegal branding of petroleum products, special selling of those products, such as paint thinners.

And the fourth was the case of the returned containers [145] that were shipped back, 50-gallon barrels, by the Military to private contractors, who reclaimed the barrels and reconditioned them for again refilling. We had one case of a private contractor who found these containers coming back from the Pacific with various quantities of motor vehicle fuel in them, and he proceeded to drain them and to accumulate an amount of over 10,000 gallons a month. In his attempt to return them to the Federal Government, the Federal Government said that

(Testimony of Harold S. Williams.)

they had no knowledge of this, that, as far as they were concerned, these containers were empty.

Again, there was the draining of airplanes, which were crated for shipment, by private contractors. Planes had to have sufficient gasoline in them for factory tests and to land the airplane. This was untaxed gasoline. These were drained and picked up by the contractor and put in containers, and they went in all directions with those particular trucks.

The Referee: In other words, there were 109 ways of beating the laws?

The Witness: That is right, Judge. That is why we have investigators and auditors.

Q. (By Mr. Stevens): Did you have a conversation with Mr. Lockwood in his office at Bell on April 22, 1946? A. Yes.

Q. Who were present on that occasion? [146]

A. Supervising Auditor Lyles, and Auditor Lickter.

Q. Will you state what you said and what any of the other parties present and Mr. Lockwood said on that occasion?

A. I was there at the request of Supervising Auditor Lyles, who reported to me that he had found this large discrepancy in gasoline sales over purchases. And he asked me if I would help him question Mr. Lockwood as to where his source of supply was, as to the apparent discrepancy. We asked Mr. Lockwood—the three of us at various times asked Mr. Lockwood for an explanation, and,

(Testimony of Harold S. Williams.)

finally, after stating he knew none, he said he would tell us the truth. And he proceeded to his safe and he produced ration books, ration stamps and ration coupons, which he said represented a very large investment to him up to the time the bomb dropped on Hiroshima, at which time the selling of gasoline without coupons to service stations, whether you have the coupons in your possession, the business went clear out the window, and the day that the war was over with Japan, and rationing was stopped, he was all finished, that was the results of his activities, and he attempted to make an explanation of the differences by stating that he had used these stamps in buying these stamps and making out invoices, which, to me, was very foolish——

Q. Just don't state your own conclusions.

A. Yes.

Q. Just what was said. [147]

A. He said to us that he was the largest, in his opinion, Black Market operator during the last six months of the war in Southern California.

Q. Did he state how much he had paid for these coupons and ration checks?

A. He stated that—as I remember, that these illegally possessed ration coupons and ration checks had cost him approximately \$30,000.

Q. Did you have another conversation with Mr. Lockwood on or about July 12, 1946?

A. Mr. Lockwood was asked to come into the office of the Supervising Auditor, Wilton, at which

(Testimony of Harold S. Williams.)

time Supervising Auditor Lyles and Auditor Weiss and myself were present.

Q. In addition to Mr. Wilton?

A. In addition to Mr. Wilton. And Mr. Lockwood gave us the same explanation at that time and approximately the same statements, except that he did not have the bundle, a large bundle, of ration stamps and coupons in his possession.

Cross-Examination

By Mr. Cobb:

Q. Mr. Williams, are you a mining engineer?

A. Previously I was. I happen to hold a degree of mining engineering.

Q. You were out to see Mr. Lockwood just before the meeting, in which you wanted to act as engineer for him in connection with a gold [148] mine?

Mr. Stevens: I object to that—

The Witness (Interrupting): I will tell you the whole conversation. I didn't offer Mr. Lockwood anything at all. I told Lockwood I would be interested in seeing any mining property. He showed me some gold samples.

Q. (By Mr. Cobb): Didn't you offer to put yourself on his payroll? A. I did not.

Q. Nothing was talked about money?

A. Nothing talked about anything like that. He suggested that he would take me in his airplane to look at the property.

Q. He told you in both of these conversations

(Testimony of Harold S. Williams.)

that he never sold any gasoline that he had not purchased from a legitimate refiner, too, didn't he?

A. That was materially his statement. He did state, however, that if he could tell what actually happened he would involve so many others who would—just what he said: He was out on a limb.

Q. He told you that he had made out invoices evidencing sales in order to acquire coupons? Isn't that right?

A. That was his statement.

Q. And that, as a matter of fact, he told you he hadn't sold any gasoline that he hadn't purchased from a legitimate refiner who had paid the tax on it?

A. He stated that, yes. Naturally he [149] would.

Mr. Cobb: That is all.

The Referee: Mr. Lockwood told you that he made out false sales tickets in order to acquire ration stamps?

The Witness: That was his statement, Judge.

The Referee: That is all.

(Witness excused.)

The Referee: It is 12 o'clock, and I will see you at two.

(Whereupon a recess was taken until 2 o'clock p.m.) [150]

Friday, November 1, 1946. 2 P.M.

The Referee: All right, gentlemen. Let us proceed.

Mr. Stevens: Are you through with your cross-examination?

Mr. Cobb: Yes. He asked if he could be excused, and we excused him.

Mr. Stevens: May it be stipulated, counsel, that these (indicating) are copies of Mr. Lockwood's brokerage reports filed by him during the period from January 1, 1946, to and including the month of August, 1946?

Mr. Cobb: Yes, I so stipulate.

Mr. Stevens: I would like to offer these, your Honor.

The Referee: All right.

Mr. Stevens: Claimant's next in order.

The Referee: Claimant's A-5.

Mr. Stevens: I have a few questions I would like to ask Mr. Lockwood.

ARLIE R. LOCKWOOD

recalled as a witness on behalf of the Claimant, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination

By Mr. Stevens:

Q. Mr. Lockwood, are you licensed as a broker of [151] motor vehicle fuel under the Motor Vehicle Fuel License Tax Law of California?

(Testimony of Arlie R. Lockwood.)

A. I was, I think, until August 31st. I don't know whether my license was revoked at that time or not.

Q. When were you first licensed as such broker?

A. I couldn't tell you the exact date.

Q. Approximately April, 1944, on through August, 1946?

A. I was under the impression I was a broker before that time, but I am not positive.

Q. Are you licensed as a distributor of motor vehicle fuel under the Motor Vehicle Fuel Tax Law of the State of California? A. No.

Q. Mr. Lockwood, would you give us the notices of determination which were mailed or served upon you by the State Board of Equalization?

Mr. Cobb: I have them attached to my file. Don't you have a copy?

Mr. Stevens: I have certified copies. We want them introduced.

Mr. Cobb: You may use that (indicating).

The Referee: They were marked for identification?

Mr. Stevens: They were marked for identification, Exhibit 1 for Identification.

The Referee: All right, sir. Here they all [152] are.

Mr. Stevens: Perhaps they are still in here (indicating). I don't know where this came from (indicating).

The Referee: I don't know what it is, sir. I didn't bring it in.

(Testimony of Arlie R. Lockwood.)

Mr. Stevens: Your Honor, do you have the hearing with Mr. Lynch? This is marked Receiver's Exhibit for Identification No. 1.

The Referee: Let me see what it is.

(Document handed to the Referee.)

The Referee: This is a check. I don't know how it got in there.

Mr. Stevens: That hasn't been introduced in this proceeding?

The Referee: No.

Mr. Stevens: Counsel, here are these photostatic copies of the determination (handing documents to counsel). Do you prefer to have those rather than file copies?

Mr. Cobb: I will stipulate that these were served on Mr. Lockwood on or about the 23rd, wasn't it?

The Witness: September?

Mr. Stevens: I guess it must have been September 25th.

The Witness: They came at various times. I don't think they all came at one particular date.

The Referee: What are they, determination certificates? [153]

Mr. Pines: Some dated October 1st.

Mr. Cobb: I will stipulate you may use photostatic copies in lieu of the originals, and that copies of these were served upon him, unless you stipulate on the date, because I don't know it. I understand it was somewhere around the 23rd or the 25th of August.

(Testimony of Arlie R. Lockwood.)

Mr. Stevens: There was only one which was served on that date. That was one which shows the first amount, \$27,799.22. That was the only one, as I understand, which was served personally. And I think Mr. Williams already testified that was served on August 23rd, 1946. The others were served by mail. And, as a matter of fact, they allowed 10 days after service by mail, together with additional time for the mail to get from Sacramento down to Los Angeles. Since this shows date November 1, 1946——

Mr. Cobb: (Interrupting): Other than the first one, they were all filed after the filing of this proceeding?

Mr. Stevens: Yes. I will stipulate they were all mailed to Mr. Lockwood after the date of the filing of this petition, the other three.

The Referee: Up to date, if Mr. Lockwood owes you any taxes at all, it is what is shown by those documents?

Mr. Stevens: That is right.

Mr. Cobb: Yes.

The Referee: Whether they were filed during this proceeding or before it? [154]

Mr. Stevens: Yes.

Mr. Cobb: Yes.

Mr. Stevens: May that be marked——

The Referee (Interrupting): Claimant's No. 6.

Q. (By Mr. Stevens): Did you turn over all of your books and records to Mr. Lynch, the Receiver in this proceeding? A. Yes.

Mr. Stevens: That is all.

Mr. Cobb: That is all.

The Referee: All right, Mr. Lockwood.

(Witness excused.)

Mr. Stevens: For the purpose of the record, your Honor, I would like to have made a part of the record the petition filed on behalf of Lockwood as Debtor for an arrangement under Chapter IX.

The Referee: That is part of my official records. I am bound to take cognizance of them. You can introduce them by reference.

Mr. Stevens: Thank you.

The Referee: All right. What is the next move?

Mr. Stevens: That is all, your Honor.

Mr. Cobb: Take the stand, Mr. Lockwood.

ARLIE R. LOCKWOOD

the Debtor, called as a witness in his own behalf, having been previously duly sworn, resumed the stand and testified as follows: [155]

Direct Examination

By Mr. Cobb:

Q. Mr. Lockwood, during the calendar year 1945 and the calendar year 1946 did you at any time purchase any gasoline from any company that was not a licensed distributor in the State of California?

A. No.

Q. What were the companies you purchased from?

A. There was the Shell Oil Company, Elm Oil

(Testimony of Arlie R. Lockwood.)

Company. And I think I purchased from the Exeter Distributors, or Exeter Sales Company. Westland Oil Company. Hal Nelson. He was a broker. And Sunray Refining Company.

Q. What was your practice in respect to a service station that desires to buy gasoline from you? Would you receipt that or have the transportation company receipt that as showing the refinery where you picked it up, or would you show it from your place of business in Bell?

A. Well, on the road they went directly from the refinery to a service station. We always used what we called "duplicate billing." The transportation company would show a ticket from the refinery to my plant, and then make out another ticket for the benefit of the customer from my plant to the station, so that the customer wouldn't know, necessarily, where the gasoline came from.

Q. The gasoline would be moved by the trucker directly from the refinery to the service [156] station?

A. Yes.

Q. It wouldn't go to your bulk plant and be unloaded and then reloaded?

A. No.

Q. And in that instance the purchaser would have a receipt showing that he had received gasoline from the Dependable Oil Company?

A. That is right.

Q. And then there would also be a receipt outstanding, showing a sale by the refinery to you with delivery to the—a certain transportation company?

(Testimony of Arlie R. Lockwood.)

A. That is right.

Q. Now, at the conclusion of the last hearing there was some documents offered as Debtor's Exhibit 1, and you were requested to examine the records and determine where the gasoline that was delivered to Mr. Fenton, as shown on Debtor's Exhibit 1, came from, and I believe you handed to me this morning certain shipping records of the Bell Oil Company.

A. That is right.

Q. And these freight bills and Roberts Tank Line receipts and the Bell Oil Company's receipts, were they all issued in connection with the sale and the delivery of gasoline?

A. Yes.

Q. And these documents are the copies—or, the [157] original documents issued in connection with the transactions?

A. Yes.

Q. And the delivery to the Fenton Oil Company that is shown on Debtor's Exhibit 1, that is the same gasoline that is covered by these delivery slips from the Bell Oil Company?

A. Yes.

Mr. Stevens: I think there are three or four dates involved. If you want to compare them, April 1st, 2nd, and——

The Witness: I might explain those, if you want me to.

Mr. Stevens: I think the document shows the date.

Q. (By Mr. Cobb): Now, the gasoline that was purchased for distribution during the calendar years 1945 and 1946, was that all tax-paid gasoline?

A. Yes.

(Testimony of Arlie R. Lockwood.)

Q. And the price that you paid for the gasoline included a three-cent State and a one-cent Federal tax?

A. Cent and a half Federal tax.

Q. Cent and a half Federal tax?

A. Yes.

Q. Now, in respect to gasoline in water: Water is everywhere, is it not?

A. Yes, it is.

Q. Gasoline will stay on top of the water in a tank? [158]

A. That is correct.

Q. How about kerosene?

A. Kerosene is heavier than gasoline.

Q. And gasoline will stay on top of that?

A. Yes.

Q. And where you have a tank bottom, that is, the fluid below the level of the drainage nozzle, what is that material, or what constitutes that tank bottom?

A. Well, it is always the heavier product. If there happens to be water in the tank, it will stay on the bottom, and if kerosene is put in that tank and it is pumped down below the outlet, and another lighter material is pumped in, it will remain on the bottom.

Q. And when you sell the product, after it has stood in the tank, when you exhaust this fluid down to the drain nozzle, you would still have a heavy compound mixture on the bottom?

A. That would be difficult to determine exactly, unless tests were made, but it is a fact, I know, that the heavier liquid will remain on the bottom.

Q. This pressure fuel, what is the composition of that?

(Testimony of Arlie R. Lockwood.)

A. Well, it is a product that has practically the same specific gravity as gasoline. In some cases—many cases it is even lighter than gasoline.

Q. And it is lighter than kerosene, is it? [159]

A. Yes, sir.

Q. And what is the use for which that is used?

A. That is used as a pressure appliance fuel for light Coleman stoves or pressure gas stoves and so forth.

Q. In connection with your business were there any instances where you would buy gasoline from a broker and bill the broker and then have instructions to bill it direct to some station operator?

A. Yes.

Q. And that would result, in so far as your records go, in two billing invoices, would it?

A. Yes, it would.

Q. Did you have difficulty with your bookkeeping department in connection with matters of that character? A. Yes, I did.

Q. Would there be instances where the driver would deliver gasoline to service station tanks and issue billings for that gas delivered? A. Yes.

Q. And if the party didn't pay cash, would you later then have to call on him, or would you call on him in the course of business, to collect for that gas? A. Yes.

Q. Were there any instances on the second occasion that you would issue another invoice when he would pay you the money? [160]

(Testimony of Arlie R. Lockwood.)

A. In many instances, yes.

Q. Then when you would go back to the office what would you do in respect to the cash and the invoice that was issued as a second invoice?

A. Ordinarily I would turn it into the bookkeeper with the money, showing the money with the receipts.

Q. And the copy you would give to the driver——

A. The driver turned in the receipts every day to the bookkeeper.

Q. Then the bookkeeper would have two invoices on the same delivery of gasoline? A. Yes.

Q. Was there difficulty with your bookkeeper in respect to transactions of that character?

A. Well, yes, there was sometimes difficulty to determine—the bookkeeper, inasmuch as I wasn't always there, the bookkeeper wouldn't always know what the transaction was.

Q. Would he accumulate certain invoices, not knowing where to put them into the books until——

A. (Interrupting): Yes. In many instances they were not a matter of record in the books.

Q. Now, how many bookkeepers did you have during this period from January 1, 1945, to August 31, 1946?

A. I think I had about six, five or six.

Q. And were some of those bookkeepers competent or [161] incompetent?

A. I found they were more or less incompetent. That is, during the year 1945 I didn't have any one

(Testimony of Arlie R. Lockwood.)

bookkeeper over a period of three or four months, long enough to discover that he wasn't keeping proper records.

Q. Was it difficult during that period to obtain competent bookkeepers where you were located?

A. Yes.

Mr. Stevens: I object on the ground that it is calling for the conclusion of the witness.

The Referee: Objection sustained.

Q. (By Mr. Cobb): Did you ever blend any foreign substance with gasoline and then sell the gasoline? A. No.

Mr. Cobb: You may cross-examine.

Cross-Examination

By Mr. Stevens:

Q. Mr. Lockwood, with reference to the date, July 31, 1945, which was the occasion upon which Mr. Williams and Mr. Wakefield called upon you and took a physical inventory of your storage tanks, did you not at that time state to Mr. Williams and to Mr. Wakefield that you had blended 792 gallons of kerosene with pressure appliance fuel, just delivered to you on that date, and that you would pay the Motor Vehicle Fuel License Tax on the amount of 792 gallons?

A. I believe I made the statement that I did pump [162] the pressure appliance fuel in the tank that had kerosene in it, and if that constituted a

(Testimony of Arlie R. Lockwood.)

blending or—if that was blending, however you want to call it, then I was willing to pay that.

Q. Did not you make the same statement to Mr. Williams on October——

Mr. Pines: He stated he would pay the tax.

Mr. Stevens: Is there anything in the record here to show the first date we started this hearing?

Mr. Pines: October 17th was the first date on which the objection was set. They weren't heard then, but they were continued from there.

Mr. Stevens: After that date.

Q. (By Mr. Stevens): Did you not state to Mr. Williams on the afternoon of October 21, 1946, that you had blended that 792 gallons of kerosene with the pressure appliance fuel and had sold what you had in the tank as motor vehicle fuel and would pay the Motor Vehicle Fuel License Tax on that quantity? A. I don't think I did, no.

Q. Then would you say you did not make that statement?

A. I don't think I stated that I would pay the tax on that kerosene.

Q. Can you state an instance, a specific instance in which you issued the double invoices on sales to one of your [163] purchasers of motor vehicle fuel?

A. Well, several instances were with Elco Oil Corporation, who are brokers, and who, in turn, sold gasoline to other brokers, and these other brokers would pick it up in their own trucks, and at which time a loading ticket would be made and later billed to Elco Oil Corporation.

(Testimony of Arlie R. Lockwood.)

Q. Can you give me any other instances in which that occurred?

A. Not at the moment, no. I have got to refresh my memory with the records.

Q. Will you do that, please?

A. Shall I go out and get them——

Q. You are here under subpoena.

The Referee: I have got them all out in the back room, if you want to go out there and look them through.

Mr. Stevens: I do want some of them.

The Referee: Take a five-minute recess while he is looking for those records.

(Recess.)

The Referee: The witness now has the documentary evidence.

Q. (By Mr. Stevens): Have you now in your possession the——

A. (Interrupting): There is a couple, yes (indicating).

Q. Were you able to find any other cases of double [164] invoices in your books and records?

A. At this time?

Q. Yes. A. Now, you mean?

Q. Yes. A. No, I didn't go any further.

Mr. Stevens: Well, your Honor, I realize that may take Mr. Lockwood some time. So, at some time I want him to produce every instance he has.

The Referee: I am wondering when we are

(Testimony of Arlie R. Lockwood.)

coming to the end of this case. You say, "some-time."

Mr. Stevens: I will be glad to finish now if Mr. Lockwood will tell us that they are the only instances.

The Referee: If you had given this man any notice that he should produce any such thing—you go in that rear room and look over the mass of records. You ought to give him fair warning. This is so drawn out that I am almost losing my reputation as a sick Job. You know, Job had a reputation for patience.

Do you want to continue for two weeks and give him an opportunity to go through all these records and documents and papers? I will do anything you say, but I would certainly like to come to the end of this case.

Mr. Pines: I would object to any such continuance, because I don't believe it is material before the Court, anyway. [165]

Mr. Stevens: This is the explanation made by this witness.

Mr. Pines: I don't think that the State has established that any gasoline was sold, except possibly some of this blending.

Mr. Stevens: This is cross-examination. I have the right to find out——

The Referee (Interrupting): All right. Let us get to it. Do you want to continue this and give this man a chance to go through those papers?

(No response.)

(Testimony of Arlie R. Lockwood.)

The Referee: Today is the 1st of November. How long will it take to look through the records?

The Witness: I don't know what I can find, your Honor.

The Referee: All right. Continue for a week——

Mr. Pines (Interrupting): Even if the case were that there weren't another one of those instances, I think the objection——

The Referee (Interrupting): He says he has a right to cross-examine, and the man explained that was the way it happened. I am sure he has that right. Do you want to continue a week?

Mr. Stevens: I am ready to go ahead as soon as he can testify on that question.

The Witness: On what question? [166]

The Referee: Give him as much time as he needs. I will continue this matter until next Friday, November 8th, at 10 o'clock. In the meantime you look through those things, Mr. Lockwood, and see what you can find. November 8th at 10 o'clock. That will give you an opportunity, a week.

The Witness: I presume so. It will take at least that long to go through that mess.

The Referee: Dig right into it, and then we can get through. The 8th of November at 10.

(Whereupon an adjournment was taken until Friday, November 8, 1946, at 10 o'clock a.m.) [167]

Wednesday, Nov. 27, 1946. 2:00 P.M.

Mr. Cobb: I just proposed a stipulation, and I think if we can agree on it it will save considerable time, if the stipulation is accepted. I may do it without prejudice to anybody's position. We were just talking about it when your Honor came in.

The Referee: All right.

Mr. Cobb: May it be stipulated, Mr. Stevens, that if a representative of the Bell Oil Company and a representative of the Elm Oil Company were called as witnesses, that they would testify that they were licensed distributors during the period covered by the audit up to May 31, 1946, and that they sold to Mr. Lockwood from time to time gasoline, and the gasoline was picked up at their refinery by Mr. Lockwood's trucks or by a public transportation company, and that Mr. Lockwood was billed for all of the gasoline, and that the billing included taxes of three cents per gallon, and that the bill was paid? And I believe I stated they were a licensed distributor of gasoline during that period of time.

Mr. Stevens: I will so stipulate.

The Referee: All right. You say that is three cents a gallon tax?

Mr. Cobb: That is right, your Honor.

The Referee: The Government is 1½ [168] cents?

Mr. Cobb: That is right.

The Referee: All right. Let's go.

Mr. Stevens: Mr. Lockwood was on the stand.

Mr. Cobb: Mr. Lockwood, will you take the stand, please?

The Referee: Let him be sworn again.

ARLIE R. LOCKWOOD

recalled as a witness on behalf of the Debtor, being first duly sworn, testified further as follows:

Cross-Examination

(Resumed)

By Mr. Stevens:

Q. Mr. Lockwood, during the weeks that have intervened between our last hearing and today, have you gone through your records and found the duplicate invoices to which you referred in your testimony at the last hearing?

A. Yes, I have. I don't know as I found them all, but I found a considerable amount, which I thought would be sufficient.

Q. Do these represent all of the invoices that you were able to find in your records?

A. Yes, sir. I think there were more; however, I couldn't definitely declare that——

The Referee: I still don't hear you. I would like to hear you. I am interested in this.

The Witness: There were probably more, but I was actually unable to find them as duplicates, so I took these. [169]

Q. (By Mr. Stevens): Mr. Lockwood, we took this continuance for the purpose of enabling you to find all of the duplicate invoices that are contained in your records, and I would like you to testify to

(Testimony of Arlie R. Lockwood.)

that fact if it is true. Otherwise, I am going to have to ask you to find all that are in the records.

A. That is an impossibility, because that bunch of books is in such a shape that I haven't been able to tell which are which; and inasmuch as I didn't handle the records, I couldn't definitely tie them up. I am unable to locate the bookkeepers that were taking care of them at that time, and I still couldn't find them all.

Q. But you have gone through the invoices?

A. Yes, I have gone through the invoices, and those are those I picked out, and I know they are definite duplicates.

Mr. Stevens: I would like to offer these in evidence, your Honor. The entire group will be marked as one exhibit, your Honor.

The Referee: I will see what it is. The last number was Claimant's A-4. I presume you want this one A-5?

Mr. Stevens: We are the Claimant.

The Referee: Claimant's No. A-5.

Q. (By Mr. Stevens): As I recall, at our last hearing you testified that you never blended any foreign substance with gasoline? [170]

A. Not intentionally or knowingly.

Q. And with respect to those two tanks, Tanks Nos. 5 and 7 in your bulk plant, in which you had 792 gallons of kerosene, isn't it true that you did blend pressure appliance fuel with that kerosene?

Mr. Cobb: I object on the ground it assumes a

(Testimony of Arlie R. Lockwood.)

fact not in evidence. The testimony was that there were tank bottoms which had water and slush and couldn't be drained off, and that was 790 gallons. Nobody knew what the content——

The Referee: As I recall his testimony, he said it had been kerosene.

The Witness: It had been kerosene; there had been kerosene in the tanks, yes.

The Referee: And it being impossible to get down underneath, then you drained it off for some reason, you dumped gasoline in on top of it, and estimated it was seven hundred and some odd gallons.

Mr. Cobb: And he also testified the water would be in the bottom of the tanks. They didn't know what the contents of the bottom was, it wasn't determined at the time, and——

The Referee: Let him now tell us what he thinks was the fact.

Mr. Cobb: That is what I would like him to do, yes.

The Witness: Was there any question?

Q. (By Mr. Stevens): Would you explain the situation [171] with reference to that 792 gallons of kerosene?

A. I couldn't testify to what was in the bottom of the tanks, but the tanks did have kerosene in them, but I don't know whether anybody pulled samples off the bottom of the tanks to determine whether it was kerosene. After the pressure appliance fuel was pumped in, whether the kerosene was

(Testimony of Arlie R. Lockwood.)

still in the bottom or whether it was blended, I don't know. I couldn't tell you what was on the bottom, but it is my opinion that if the gasoline was pumped in on top of the kerosene, it would probably remain there necessarily without blending.

Q. Are you a petroleum engineer?

A. No, I am not, but——

Q. You are not? A. No, but——

Mr. Stevens: Then, your Honor, I move to strike the statement about his opinion.

The Referee: That is a conclusion.

The Witness: I couldn't testify what was on the bottom of the tanks, or was at that time.

The Referee: I have heard oil and water wouldn't mix, but I haven't heard kerosene and gasoline wouldn't. All right, it may go out.

Q. (By Mr. Stevens): Is it your explanation that you pumped those two tanks as low as you possibly could by suction before you pumped in the pressure appliance fuel? [172]

A. They were pumped until the pump quit pumping, and I assumed that they were down to where they started to suck air, which would probably be the top of the suction line. I don't know exactly where. I think that that pump on those tanks was a centrifugal pump, and immediately when it gets air, it ceases to pump. I couldn't testify as to where the level is in the tank when it quits pumping.

Q. But it is your testimony that you did pump

(Testimony of Arlie R. Lockwood.)

those two tanks that had contained kerosene down to the point where they were drawing air?

A. It was down to the point where the pump ceased to pump any more, and I assumed that they were empty by that fact.

Mr. Stevens: That is all.

The Referee: Anything further?

Redirect Examination

By Mr. Cobb:

Q. Mr. Lockwood, you put in pressure appliance fuel, did you not? A. Yes.

Q. That is not the same as gasoline?

A. It is not exactly the same; it is very similar.

Q. But it is sold for what use?

A. It is sold for, oh, such as Coleman pressure stoves and lanterns, and so forth. I think it is a little lighter fuel than gasoline. [173]

Q. Which is the heavier, kerosene or gasoline?

A. Kerosene.

Q. And when you have a heavier and a lighter petroleum product what results if they are placed in a container?

A. Well, unless they are agitated, they will probably separate and the heavier product will remain on the bottom, or go to the bottom.

Q. Now, was this tank ever aggravated or—what did you call it? A. Agitated?

Q. —agitated after the pressure appliance was put in, the pressure appliance fuel was put on

(Testimony of Arlie R. Lockwood.)

top of the tank bottom? A. Not after, no.

Q. In the course of time, if there is any water in the product stored in the tank, the water settles to the bottom? A. Yes.

Q. And that is what is commonly known as "tank bottom"? A. That is right.

Q. And if there is a further product, wax and petroleum or dirt, what happens to that?

A. Well, it all settles to the bottom. It all has to do with gravity. Petroleum products are different gravities, and of course any foreign matter, such as dirt or water or [174] any number of things that could be picked up by the pump or picked up in the process of transportation—that is the reason we have a bottom on the tank, to eliminate the possibility of the product being contaminated with water. In fact, gasoline tanks have plenty of space in the bottom, and some refineries keep water on the bottom for the protection of a location, because if the tank springs a leak, they lose water and not gasoline. I don't make that a practice, but we do have water in them very frequently, and when it reaches the point it is picked up by the pump, we pump it out so it won't be in the lines and in fuel, and so forth.

Mr. Cobb: That is all.

The Referee: Let me ask you a question. These tanks you have, were they filled from the top or from the bottom?

The Witness: They are filled from the bottom, and they are also pumped out from the bottom.

(Testimony of Arlie R. Lockwood.)

The Referee: Was there no outlet on the bottom of the tank by which you could drain it entirely of its contents?

The Witness: Yes, we have what we call water draws on them that are below the suction. Say this represents a side of the tank, and the outlet, we will say, is here. The bottom of the tank is down here, and as closely to the bottom as possible we have water draws, and occasionally if we don't pump it out, we have to open that valve and drain it out. [175]

The Referee: These tanks you have, was there anything on the bottom or side of them by which you could empty the tank entirely, whatever the content—water or gasoline or kerosene?

The Witness: No, I don't have any bells on those two tanks, so I would have to put a hose down from the top.

The Referee: How high from the bottom of the tank was the inlet which permitted you to fill the tank with fluid?

The Witness: How high from the bottom?

The Referee: Yes.

The Witness: Well, I don't recall that I have ever measured it. I think about five or six inches. I am not sure about that.

Mr. Stevens: We are going to produce some testimony about that, your Honor.

The Referee: Fine. I have never seen those tanks. I was just curious whether you took it out

(Testimony of Arlie R. Lockwood.)

from the top as they do gasoline. I have seen them stick a hose down from the tank top.

The Witness: That is a loading rack. They are filled from the top and pumped out from the same hose.

Mr. Pines: If the Court please, I don't like to see the record cluttered with immaterial matters; and at this time as attorney for the Receiver I would like to move to strike all of the testimony with reference to the blending, [176] on the ground that pressure appliance fuel is not a motor fuel subject to the tax, and in any event this is not pertinent to the issue before the Court.

Mr. Stevens: If the Court please, we are going to show that pressure fuel is a motor vehicle fuel, and is tax paid.

Mr. Pines: Will the Court let the motion be submitted, and after the argument the Court can pass on the motion? I ask that because I think all of this is immaterial.

The Referee: All right.

Mr. Pines: I would like to call the Court's attention that in checking my notes I find that there were Claimant's Exhibits A-5 and A-6 produced at the last hearing, A-5 consisting of the book-keeper's reports in 1946, and A-6 consisting of releases, so that the last exhibit, consisting of the duplicate invoices, should properly be marked A-7.

The Referee: All right, change it to A-7.

(Said duplicate invoices were marked Claimant's Exhibit A-7.)

(Testimony of Arlie R. Lockwood.)

The Referee: Any other questions from this witness?

Recross-Examination

By Mr. Stevens:

Q. Isn't it true, Mr. Lockwood, that pressure appliance fuel is a motor vehicle fuel?

Mr. Cobb: To which we object because it calls for a conclusion of the witness, and it depends on the definition [177] of the statute, and specifications.

Mr. Stevens: He testified as to what it was used for.

The Referee: I think he as a distributor can say what it was sold for, Mr. Cobb.

Mr. Cobb: Yes, he can say what it was sold for, but he asked him as a conclusion whether it was a motor vehicle fuel. They even burn alcohol sometimes for a motor vehicle fuel, but that isn't a gasoline.

The Referee: What did they buy that fuel for?

The Witness: I am handling it at the present time, and it is sold solely for——

The Referee: We are talking about the past. What did you sell it for?

The Witness: We sold it as a pressure appliance fuel. However, I later pumped what was left in the tanks into the gasoline, and incidentally I paid the State tax on that pressure appliance fuel when I bought it.

Q. (By Mr. Stevens): You paid the tax not

(Testimony of Arlie R. Lockwood.)

only on the amount which you pumped into your gasoline tanks, but also on the entire quantity which you purchased; is that not correct?

A. That is right; I paid the State tax on the entire load.

Q. And pressure appliance fuel can be used in automobiles as a motor vehicle fuel, can it not? [178]

Mr. Pines: Just a minute. I object to that as incompetent, irrelevant and immaterial. You can use kerosene, but that doesn't make it gasoline.

The Referee: The question is whether it is a motor fuel, and whether it is taxable.

Mr. Pines: That is a legal question. The witness is not competent to answer that.

Mr. Stevens: It is also a question whether it can be used in automobiles as a fuel.

The Referee: I would like to know. Let him answer the question. What was your answer?

The Witness: It can be used as a motor fuel. So can kerosene, alcohol, or any number of other products.

Q. (By Mr. Stevens): I understood you to refer to a refinery. Do you have a refinery?

A. I didn't refer to my refinery. If I did, it was an error. I didn't mean to refer to it.

Mr. Stevens: That is what I wanted to clear up.

The Referee: There is one question that is still kind of hazy in my mind. What was the purpose of issuing duplicate sales tickets? If you sent out with your driver an original, what was the use of

(Testimony of Arlie R. Lockwood.)

sending out another one? What was the purpose of that?

The Witness: I didn't send them out. If you are referring to those which I just introduced, those are in the form of receipts where another person made a collection and [179] made a receipt at that time for both the customer and our records. I think you will notice particularly on the one you are looking at, he has collected for this particular invoice here for 600 gallons. A receipt was made for 600 gallons of gasoline, \$93, and he has listed the coupons that he picked up at that time. This doesn't necessarily mean that it is an exact duplicate of the gallons that were delivered by the truck, but is a receipt for gallons of gasoline that were delivered previously, and possibly at the time the driver collected this amount of money the station that it was delivered to only had 600 gallons of coupons, so he made a receipt out for 600 gallons and collected that amount of money and coupons, so this is a duplication. It isn't for a delivery of gasoline.

The Referee: What was the purpose of that? Why didn't your driver put all the notations on the original?

The Witness: Because the driver would deliver the gasoline, but he didn't always collect for the gasoline. He would make a bill which he would turn in, saying there were delivered 1000 gallons of gasoline, and maybe another driver would go out and collect maybe the same afternoon, maybe the next day, maybe a week later. In many cases the

(Testimony of Arlie R. Lockwood.)

service stations didn't have the coupons ready, or didn't even have the coupons, and when he went out to collect he would give them a receipt for the gallons and the amount of coupons, and these represent deliveries of gasoline—they [180] are not receipts.

The Referee: Would your drivers deliver gasoline to the stations without picking up the coupons?

The Witness: They have in many cases, yes.

The Referee: Is that according to the rules and regulations?

The Witness: There was always a big argument about that. We made it a common practice to do that, yes.

The Referee: What would happen if Bill Jones never did get the coupons, and you delivered thousands of gallons?

The Witness: I don't know what would happen in that case.

The Referee: You would go down and have to explain to somebody.

The Witness: Well, we did quite a bit of explaining frequently, as far as that is concerned. But I think there was quite an issue made of that fact. All gasoline companies resented the fact that they had to have their drivers wait until the stations got coupons ready, and so forth. That was quite a sore spot.

The Referee: Wasn't it a part of the rules and regulations you were not to deliver gasoline without coupons?

(Testimony of Arlie R. Lockwood.)

The Witness: I couldn't say what the regulations were. I know we all made a practice of delivering gasoline without coupons and collecting them later.

The Referee: You were more generous than they were [181] with me. They would ask me to see my coupons before they would start with the hose.

Mr. Cobb: I think he couldn't collect coupons before he delivered. They couldn't until they collected from the service station. His collection should balance the amount of gasoline that was delivered, and he passed them in on back down the channel until they reached the party that had to finally account.

The Witness: To give you an example, I bought hundreds of thousands of gallons from Bell Oil & Refining Company. My account was on an open account basis, and generally at the end of the month, and two or three times a month, I would send them a check for money I owed them, and at the same time I would send them a check for the coupons I owed them, and it would sometimes run into hundreds of thousands of gallons. I might have received a hundred thousand gallons of gasoline, but no coupons changed hands until I wrote a check for the coupons also.

The Referee: Any other questions of this witness?

Q. (By Mr. Stevens: These two tanks, Nos. 5 and 7, in which you had the kerosene——

A. 6 and 7.

(Testimony of Arlie R. Lockwood.)

Q. ———were both filled and pumped out with the same pipe, were they not?

A. No, I think that each had a separate pipe to the pump. At this time they are connected together, but at that [182] time they were separate, I am quite sure.

Q. You didn't load the tanks then and unload them through the same pipe?

A. No, I don't think so.

Mr. Stevens: That is all.

Mr. Cobb: That is all.

(Witness excused.)

The Referee: Next witness.

LLOYD DYER

called as a witness on behalf of the Debtor, being first duly sworn, testified as follows:

Direct Examination

By Mr. Cobb:

Q. Will you state your name, please?

A. Lloyd Dyer.

Q. Where were you employed during the calendar years 1945 and 1946?

A. 1945 I was employed by Dependable Oil Company, and in 1946 I don't remember just exactly when I went into business for myself.

Q. And when you say Dependable Oil Company, that is Mr. Lockwood? A. Mr. Lockwood.

(Testimony of Lloyd Dyer.)

Q. Doing business as Dependable Oil Company?

A. Yes, sir.

Q. During the time you were employed by Mr. Lockwood, [183] what were your duties?

A. I drove a truck, a lubricating oil truck delivering oil, gasoline and cleaning solvent to service stations.

Q. Did you do any collecting? A. Yes, sir.

Q. And will you state in your own words what your procedure and practice was during the time that rationing was on with respect to stamps in collecting and making out of receipts?

A. Well, there were some customers that Mr. Lockwood sold gasoline to that he also sold oil to. These customers Mr. Lockwood would send his gas truck out there, and when I would go into the plant and was loading my truck up, he would say, "If you go by Santee Service today, see if you can collect that money from him. He owes us for gasoline." I would go down there, the gasoline would already be delivered, and I would ask him for the money. He would say, "Well, I haven't got the stamps ready. I have got seven or eight hundred gallons and you can take this and the money for this, and we will keep a record of this." So those duplicate bills with my name on them would be destroyed after I came into the plant and a record was made of them, because they are nothing but receipts where I collected the money for so many gallons of gas.

Q. You turned those in to the bookkeeper?

(Testimony of Lloyd Dyer.)

A. Yes. As I turned the money in for my sales on [184] the oil, I also turned those in.

Q. And when the gasoline was delivered, the truck that delivered it would also leave a delivery slip?

A. Yes, sir; that is true.

Q. Will you examine the documents there marked Claimant's Exhibit 7 and see whether there are any of those documents that you made out?

The Referee: What is this witness' name, Smith?

The Witness: Dyer. This one is not mine. The others up to this are mine.

Q. (By Mr. Cobb): 1700 made out on 1/8/45, that isn't yours?

A. No, sir.

Q. Go ahead. Up to that point all of them are yours?

A. No. These are not mine. This is mine.

Q. Well, the first one I have identified, that was yours, and then down to January 12, 1945, one marked paid, representing 457 gallons of Ethyl, that is yours?

A. Yes, sir.

Q. But the ones in between are not yours?

A. No, sir; these are not mine. This is not mine.

Q. That is the one of 6/5/45 for 2900 gallons of Ethyl, to Ward Bloom or Mark Bloom?

A. Yes, sir.

Q. That is not yours?

A. No, sir, that is not mine. [185]

Q. The others following that are yours?

A. No, these are not mine here.

Q. 12/29?

A. No, sir, that is not mine.

(Testimony of Lloyd Dyer.)

Q. You are referring to 590 Tetra Ethyl?

A. Yes, sir.

Q. To Harry? A. Yes.

Q. Now, you would not make a receipt out for more than they had stamps for?

A. No, sir; I wouldn't do it. If they had the stamps there I would list the stamps and take what stamps they had, and what money—it would represent the amount of gallons they had in stamps, and I would take the stamps in.

Q. If they owed more money, you would just let them owe it?

A. I would just let them owe it. I just collected what I could get out of them, that is all.

Mr. Cobb: You may cross-examine.

Mr. Stevens: No questions.

The Referee: You may stand aside, sir.

(Witness excused.)

The Referee: Anything further?

Mr. Cobb: I think that is all we have, your Honor.

Mr. Stevens: I would like to call Mr. Lyles to the stand again. [186]

VIRGIL M. LYLES

recalled as a witness on behalf of the Claimant, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination

By Mr. Stevens:

Q. Mr. Lyles, I am handing you the group of invoices which are marked Claimant's Exhibit A-7. I am going to ask you to go through those invoices and separate those which you included as sales in your audit.

A. This is going to take a little time.

Mr. Stevens: Perhaps we could save some time by putting on another one of my witnesses while Mr. Lyles goes through these.

The Referee: All right.

(Witness withdrawn.)

Mr. Stevens: I will call Mr. Wakefield to the stand.

CLARENCE M. WAKEFIELD

recalled as a witness on behalf of the Claimant, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination

By Mr. Stevens:

Q. You are C. M. Wakefield?

A. Yes, sir.

Mr. Stevens: Mr. Wakefield has testified previously. [187]

(Testimony of Clarence M. Wakefield.)

Q. (By Mr. Stevens): Mr. Wakefield, did you measure the distance from the bottom of tanks 5 and 7 on Mr. Lockwood's premises, his bulk plant premises, to the pumping outlet? A. I did.

Q. Would you state what those measurements are with respect to each tank?

A. No. 5 was $6\frac{1}{2}$ inches from the bottom of the tank or bottom of the pipe to the bottom of the tank, which included the bottom plate of the tank, which would probably be about six inches.

The Referee: Am I to understand that the pipe that let the fluid run into the tank was approximately six inches above the level of the bottom of the tank?

The Witness: That is right. That was also the fill pipe and the unloading pipe. There was only one pipe. When they loaded the tank the fluid went through that pipe; when they unloaded, it also went out the same pipe.

Q. (By Mr. Stevens): Was there any valve at the bottom of the tank by which it could have been emptied?

A. On 5, I don't believe so. 6 and 7 had a pet cock at the bottom.

Q. What was the distance between those two points in tank 7?

A. $11\frac{1}{2}$ inches.

The Referee: How much?

The Witness: $11\frac{1}{2}$ inches, which left there really about [188] an inch of fluid that would be in the bottom above the drain pipe.

(Testimony of Clarence M. Wakefield.)

Mr. Stevens: That is all.

The Referee: Any questions, Mr. Cobb?

Cross-Examination

By Mr. Cobb:

Q. You don't know how low the liquid would be lowered by the application of a suction pump to the fluid in tank No. 5?

A. Yes, it would be probably six inches, the fluid in the bottom, after the suction, up to the suction.

Q. And do you think there would be an inch in the other tank? A. Yes, sir.

Q. Now, the only way you could get that out would be to bring somebody with special equipment out there to clean the tank out, this particular tank 5?

A. You mean if you wanted to recover the bottom part of it? Sometimes they put water in and force up the fluid that they want to recover up to the suction line, and recover the stuff above. Other than that, they would take a hose and drop it over and pump it out.

Mr. Cobb: That is all.

The Referee: Let me ask you a question. It may be silly—but if you put water in gasoline, do they mix?

A. No, they do not mix. In taking inventories— [189] I have taken hundreds of inventories at refineries—we use different pastes to determine the amount of water, which we did in this case.

(Testimony of Clarence M. Wakefield.)

And in taking the inventory, is the bottom of the plumb bob we put this paste. The paste as soon as it enters the water turns a different color from the gasoline, and therefore we can determine to the eighth of an inch how much water there is there.

The Referee: Then if you had say six inches of water in the bottom of this tank and put gasoline on top of it, am I safe in saying the gasoline would stay on top of that water?

The Witness: Within a half hour, yes.

The Referee: What happens during the half hour?

The Witness: If it was dumped in from the top, there would be a certain amount of water come up, which would immediately settle. It would take a little while for it to settle. It would agitate it to the extent there would be some water above, and it would take a few minutes for that to settle.

The Referee: All right.

(Witness excused.)

Mr. Stevens: I would like to recall Mr. Williams.

HAROLD S. WILLIAMS

recalled as a witness on behalf of the Claimant, having been previously duly sworn, resumed the stand and testified further as follows: [190]

Direct Examination

By Mr. Stevens:

Q. Mr. Williams, do you hold a degree from any college or university?

(Testimony of Harold S. Williams.)

A. Yes, University of California.

Q. And in what school was your degree obtained?

A. Mining and Petroleum Engineering.

Q. Since graduation have you been engaged in petroleum engineering?

A. Shortly after graduation I left the mining—I did start in the mining industry, and switched to the petroleum industry in 1921. I have been actively identified and connected with it, both in refining and in marketing, since 1921.

Q. Is it possible for kerosene to be blended with gasoline or other motor vehicle fuel?

Mr. Cobb: To which we object on the ground it calls for a conclusion of the witness, and it is immaterial and irrelevant as to whether it is possible to mix it. I think we can all stipulate that water and anything else can be mixed for a certain period of time.

The Referee: Well, the gentleman has had some 24 years' experience after graduation, as an expert. I think he should be qualified to tell us. The objection will be overruled.

The Witness: Yes. Motor vehicle fuel or gasoline [191] and kerosene will, when blended, mix and commingle into a homogenous liquid.

Q. (By Mr. Stevens): Now, let's get down to the specific facts of these tanks 5 and 7 in Lockwood's bulk plant.

A. Yes, sir.

Q. On the date that you and Mr. Wakefield took your physical inventory, March 31, 1945.

(Testimony of Harold S. Williams.)

A. I have the original copy signed by Mr. Lockwood.

Q. You have heard Mr. Wakefield's testimony to the effect that with respect to tank No. 5 there was 61½ inches from the bottom of the tank to the bottom of the outlet? A. Yes, I did.

Q. Can you tell us how many gallons of liquid could be contained in that tank?

A. May I make an explanation? Tank 5—Mr. Wakefield got his numbers reversed. Tank 5, the outlet is an inch and a half off the bottom, and tank 7, 61½ inches. The figures that I have, and according to the figures that were taken in tank 5, with an inch and a half off the bottom, there would be, with the calibrations of that tank, 60 gallons in the bottom of that tank up to the outlet pipe. The capacity of that tank was 3.96 gallons per inch, and there was no water in the tanks at the time we took the inventory, because we gauged, Mr. Wakefield and myself, in company with Mr. Lockwood, to the water gauges on each tank [192] in the plant, and we found water in tank No. 2, the gasoline tank, 11¼ inches. The method was as explained by Mr. Wakefield, water paste at the bottom of the tape and bob. There was no water in tank 2 at the time of our inventory, upon the day the pressure appliance fuel and kerosene inventory took place.

Q. And tell me what the——

A. Pardon me. The calibrations was 22½ inches, and then 61½ off the bottom—I didn't multiply it,

(Testimony of Harold S. Williams.)

but it would be six times $22\frac{1}{2}$, about 135 gallons in the bottom of that tank. The total of the two tank bottoms to the suction line was about 195 gallons.

Q. Now, from your experience as a petroleum engineer, will you give us your opinion as to what will happen when pressure appliance fuel is pumped into tanks containing kerosene above the level of the intake pipe?

A. Pumping into a tank directly into a liquid, pumping gasoline into a liquid would create sufficient turbulence in those bottoms, as they are called, tank bottoms—we must judge there was in either tank at least 200 or 400 gallons or more in each tank bottom above the suction line. The pumping in of that motor vehicle fuel into the kerosene would create sufficient turbulence that the gasoline would blend with the largest proportion of the kerosene that was in the bottom of the storage tank, and make rather a homogenous liquid. As we know, a blend of gasoline, half [193] gasoline and half kerosene is ruled as taxable motor vehicle fuel.

Mr. Pines: I move to strike the answer of the witness on the ground it is not responsive to the question. The hypothetical question which was put to him dealt with the commingling of pressure appliance fuel and gasoline, and the answer dealt with commingling of gasoline and kerosene.

The Referee: The motion will be denied. It is quite illuminating.

The Witness: Gasoline or pressure appliance fuel has been, or was in most instances——

(Testimony of Harold S. Williams.)

Mr. Pines: Just a minute. I object to any voluntary statement.

Mr. Stevens: I will ask him the question.

Q. (By Mr. Stevens): Will you state what pressure appliance fuel is?

Mr. Pines: Just a minute. I object to that on the ground no proper foundation has been laid. The witness doesn't know whether it is for tax purposes or whether it is for——

The Referee: Well, let's find out.

Mr. Pines: I think the question ought to specify, so we will know what he is talking about. We may get a conclusion into this record which may have no bearing on the issues.

Mr. Stevens: I will ask the question in order to [194] meet Mr. Pines' objection.

Q. (By Mr. Stevens): What types of fuels are motor vehicle fuels as determined with respect to the Motor Vehicle Fuel License Tax Law?

Mr. Pines: I object to that as calling for a conclusion of this witness, a conclusion of law by this witness, and there is no proper foundation laid for his testifying as to such questions.

The Referee: The objection will be overruled. Here is a man who has been working for years in this line, and he must have read it and must know the rules.

Mr. Pines: The best evidence would be the law.

The Referee: That is true, but I am not going to be that technical. Here is a man that has been for years and years with this problem, and you

(Testimony of Harold S. Williams.)

want to say he doesn't know what rules he is working under. I am looking for the truth. The objection will be overruled.

Mr. Pines: I wouldn't have made any objection if he had been asked to state the rules. He was asked to state his personal conclusion.

The Referee: He is telling you what he has read and known for many years.

Mr. Stevens: I will read into the record——

The Referee: Show it to Mr. Pines.

Mr. Pines: I know the rule, your Honor. He might read from something you might [195] question.

The Referee: I am familiar with it. That is the law. I don't think it is proper for this man to give his personal opinion.

Mr. Stevens: Section 7308 of the Taxation Code of the State of California reads as follows:

“ ‘Broker’ includes every person, other than a distributor, dealing, either as the owner or as the agent of another, in motor vehicle fuel, kerosene distillate, kerosene, Diesel fuel, gas oil, stove oil, distillate or any other petroleum product used in, or which may be used, in blending, compounding, or manufacturing of motor vehicle fuel.”

Mr. Pines: It is stipulated, your Honor, that the law so provides.

The Referee: All right; there is your answer.

Mr. Stevens: Perhaps, Mr. Reporter, it would be best if you could read the last question which I put to Mr. Williams.

(Record read.)

(Testimony of Harold S. Williams.)

Mr. Stevens: Will counsel also stipulate that Section 7304 of the Motor Vehicle Tax Act provides:

“Motor vehicle fuel includes gasoline, natural gasoline, and any inflammable liquid, by whatever name the liquid may be known or sold, which is used or is usable for propelling motor vehicles operated by the explosion type of engine.” [196]

It does not include kerosene.

Mr. Stevens: I will so stipulate if counsel will also stipulate that in the case of *People vs. Sterling Refining Company*, 86 Cal. App. 558, the Court held that gasoline which is one-half kerosene constitutes an inflammable liquid, and if sold to operate motor vehicles on public highways is subject to the tax.

Mr. Pines: I am not required to stipulate.

Mr. Stevens: You are offering the stipulation.

Mr. Pines: May I be heard?

The Referee: The stipulation is out. Let's get on to something else.

Mr. Pines: No one stipulates to the holding of a case if he can produce it. I haven't read the case. I would be glad to stipulate if it so held, which I doubt.

The Referee: Let's get on.

Mr. Pines: The purpose of the use that the law itself sets forth is the criterion.

Will you read the last question again, Mr. Reporter?

(The record was read.)

The Referee: That was answered by your reading from the Tax Act, wasn't it?

(Testimony of Harold S. Williams.)

Mr. Pines: That is right, the Motor Vehicle Fuel License Tax.

Q. (By Mr. Stevens): Is pressure appliance fuel a liquid which is used or is usable for propelling motor [197] vehicles operated by an explosion type of engine?

A. It is usable and was used considerably during gasoline rationing, because pressure appliance fuel, while subject to the three cents a gallon motor vehicle fuel tax, was not rationed by the OPA. In fact, most pressure appliance fuel was straight water-white gasoline, and met fully gasoline specifications.

Q. And the distributors of motor vehicle fuel pay the motor vehicle license tax upon their distribution of pressure appliance fuel?

A. Right; they do.

Mr. Stevens: That is all.

Cross-Examination

By Mr. Cobb:

Q. And after they pay it, they can get it back if they file an application to show it is used for appliance purposes?

A. If they make an affidavit that they have used it for other purposes than a motor vehicle fuel.

Q. Now——

A. They can do that with gasoline, too.

Q. In your computation on these tank bottoms, you computed the tank as being 6½ there for the inventory, did you not?

A. That is right.

(Testimony of Harold S. Williams.)

Q. You heard Mr. Wakefield testify that he allowed a [198] half an inch by reason of the tank plate?

A. The way I took Mr. Wakefield's testimony was that he didn't allow 6½. He allowed 6½ from the bottom of the tank, and there would be only 6 inches of liquid in the tank, which would reduce those gallons an additional small amount. These tanks are not large tanks, and the capacity per inch is not very large.

Q. You made no test when you were there and were told that that had been done on that particular day, you made no test to see what the specifications of the contents of the tanks were, did you?

A. We normally don't do that when we are taking gauges.

Q. You didn't do it?

A. No. We asked Mr. Lockwood what was in the storage tanks.

Q. And this tape you run down to measure that has the color indicator on it, you have to allow for some discrepancy in that, don't you?

A. No. You have a bob at the end, but if it measures on the bob, you bend your tape back and measure the actual number of inches and read on the bob, which is on the bottom.

Q. The bob that is on the bottom doesn't have this chemical that registers water, does it?

A. Right to the very bottom of it, yes, right to the [199] very tip.

Q. Why does Mr. Wakefield make an allowance

(Testimony of Harold S. Williams.)

of a portion of an inch for the inability of the tape to register the amount of water?

A. He didn't make such a statement as that. He wouldn't, because we take a bob—if you have ever seen a surveyor's tape, the bob is carried separately so it doesn't break the tape. We hang that on the bottom. It is a completely calibrated tape, right at the very bottom of the bob. We drop it to the bottom of the tank. We have water paste on it from the very tip right up the side.

Q. If the tank is unlevel, your reading on that tape would be deeper on one side and shallower on the other, wouldn't it?

A. It is possible. It would have to be very badly tipped to be very much out of kilter, however, Mr. Cobb.

Q. Well, depending on the degree that is off level, it would depend upon the degree of the depth below this drainage, wouldn't it?

A. No. We drop right to the bottom of the tank. If the tank is a little off tilt, we would certainly notice any great tilt and try and take that into computation.

Q. You didn't have a level and make any effort to determine whether this was level or not?

A. In fact, we walked completely around the tank, because in making the calibrations we had to observe the [200] circumference of the tank.

Q. You have seen tanks cleaned out, and you have never seen one where it wasn't at one end

(Testimony of Harold S. Williams.)

there was a certain amount of liquid, and on the other it was dry?

A. Yes, but when that is measured it would be three or four gallons.

Q. You can't tell by looking at a tank whether it is one or two inches off level or not?

A. If it is one or two inches off, it would only make a difference of 4.0 gallons.

Mr. Cobb: Read the question.

(Question read.)

A. I think you could tell, because the tank would probably be tilted. That is a vertical tank.

Q. (By Mr. Cobb): You mean to say you can tell or can't you?

A. I won't say I can tell exactly to the inch or two inches.

Mr. Cobb: That is all.

The Referee: Any other questions?

Mr. Stevens: No.

(Witness excused.)

Mr. Stevens: Mr. Reavis. [201]

H. CLAY REAVIS

called as a witness on behalf of the Claimant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Stevens:

Q. State your name, please.

A. H. Clay Reavis.

(Testimony of H. Clay Reavis.)

Q. By whom are you employed?

A. By the State Board of Equalization, State of California.

Q. And what is your position?

A. Auditor, Grade 3, in charge of the outside auditors of the Motor Vehicle Fuel Tax Department.

Q. What are your duties in that division?

A. Reviewing and assigning of audits from the Southern Division of the Motor Vehicle Fuel Tax Department.

Q. As a part of your duties in reviewing, do you make recommendations that additional assessments be made in the event the audits justify that?

A. I do.

Q. Did you in the month of March or April, 1946, receive a request from Bell Oil Company for the Commission to surrender its license as a refiner and distributor?

Mr. Pines: I object to that as being incompetent, irrelevant and immaterial.

The Referee: I don't know what the purpose of it is. [202] Objection overruled.

The Witness: The request would go to Sacramento for cancellation of distributor's license, and that was received in Sacramento sometime about the 1st of April.

Q. (By Mr. Stevens): What did you receive?

A. We received a notice of the request for cancellation and a final audit being set up then for the Bell Oil & Refining Company.

(Testimony of H. Clay Reavis.)

Q. Did you assign an auditor to go out and make a close-out audit of Bell Oil & Refining Company?

A. I did.

The Referee: Where was the Bell Oil located?

The Witness: The Bell Oil & Refining plant, the refinery itself is located at Santa Maria. Their head offices, where all the records are available, were here in Los Angeles at 1020 Pacific Finance Building, Los Angeles, California.

Q. (By Mr. Stevens): Have you in your possession the close-out audit for Bell Oil & Refining Company? A. I have.

Q. Does that audit disclose that any sales were made by Bell Oil & Refining Company after March 31, 1946.

A. Our audit discloses as of March 31, 1946, all motor vehicle fuel, either raw or finished, was turned over and invoiced to the Sun Ray Oil Company at the time they took over under a new distributor's license as of April 1st.

The Referee: 1946? [203]

The Witness: 1946, April 1st.

Q. (By Mr. Stevens): And have you received any further report from Bell Oil Company to show that any additional sales were made after March 31, 1946, by it to any other person?

A. No, sir.

Mr. Stevens: Cross-examine.

(Testimony of H. Clay Reavis.)

Cross-Examination

By Mr. Cobb:

Q. Sun Ray continued to operate the business formerly conducted by the Bell Oil Company?

A. That is right, Sun Ray Bell Oil Corporation.

Mr. Cobb: That is all.

(Witness excused.)

The Referee: We will take a short recess at this time.

(Recess.)

Mr. Stevens: I will call Mr. Lyles back to the stand.

VIRGIL M. LYLES

recalled as a witness on behalf of the Claimant, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination

By Mr. Stevens:

Q. Have you completed your examination of the invoices contained in Claimant's Exhibit A-7? [204]

A. Yes, I have.

Q. Now, will you state—I am going to try to make it easy for myself, and just ask you to state your findings with respect to those invoices.

A. Well, I find that there are invoices representing 49,465 gallons which appear on the face of them to be sales invoices. They are entered in Mr. Lockwood's sales record, and from there of course in-

(Testimony of Virgil M. Lyles.)

cluded in his broker's report, and are also in our audit. I see no reason from what I have here to say that they are duplicates.

Q. Is that true of all of the invoices?

Mr. Pines: Just a moment. I move to strike the testimony of the witness as to what he doesn't see any reason to include, as a conclusion.

The Referee: All right.

Q. (By Mr. Stevens): Is that true of all of the invoices that are a part of Claimant's Exhibit A-7?

A. That is not true of all of them. I also have invoices totaling 33,480 gallons, which are paired invoices—that is, there are two invoices in each case.

Q. Will you state which ones those are?

A. Well, first I will say there are two invoices which appear to represent the same sale in each instance. There is on June 6th an invoice to Elco Oil Corporation, No. 1194, for 2,900 gallons, and an invoice to Warren Service, No. 1613, for 2,900 gallons. We have in the audit [205] the invoice to Elco for 2,900 gallons. We don't have the invoice to Warren Service.

There are two invoices dated December 5th, which are merely an invoice and its duplicate, or rather carbon copy, to Dependable Service, No. 2497. We have that in our audit as a single item; that is, the gallonage is 450 gallons. We have 450 gallons, we do not have 900. We do not have it twice.

On July 11th there are two invoices to Elco Oil Corporation, No. 1938 and No. 1939. No. 1938 is

(Testimony of Virgil M. Lyles.)

marked a duplicate, and we do not have it in our audit. We do have No. 1939.

Under date of June 5th there is an invoice to Mark Bloom, No. 1611, 2,900 gallons. On the same day there is an invoice to Elco Oil Corporation, No. 1191, for 2,900 gallons. We have the invoice to Elco Oil Corporation. We do not have the invoice marked "Bloom."

On June 2nd there is an invoice to Mark Bloom, No. 1603, for 2,900 gallons. On the same date an invoice to Elco Oil Corporation, No. 4166, for 2,900 gallons. We have the invoice to Elco Oil Corporation. We do not have the invoice to Mark Bloom in our audit.

On December 29th there is an invoice and its carbon copy to Harry, No. 0436, for 590 gallons. We have the invoice once—that is, 590 gallons. We do not have both the original and the copy in our audit. [206]

Q. Do you find any invoice which is not reported either in the books, the sales book of Mr. Lockwood, or your audit?

A. On March 16th I find an invoice to Al Smith, No. 1414, for 814 gallons. I do not have it in the audit, nor is it in the sales book that I can find.

Q. In other words, from your examination of the invoices included in Claimant's Exhibit No. A-7, you have found no invoice which constitutes a duplication of any invoice which you have included in your audit?

A. I find no invoice that I would say is a dupli-

(Testimony of Virgil M. Lyles.)

cation. That is, that has been entered in my audit and results in a duplication of sales in the audit.

Q. I see that you have made a pencil list of these invoice numbers, and also have noted beside each invoice number the date of the sale and the name of the vendee. Now, referring to Elco Oil Corporation, the sale on May 22, 1945, invoice No. 1168 for 1,400 gallons, have you anything in your records and working sheets to show a cross check between that figure and the records of Elco Oil Corporation?

A. We have an audit of Elco Oil Corporation showing the receipt of the gasoline in that invoice.

Mr. Stevens: I think that is all that I have to ask of this witness. [207]

Cross-Examination

By Mr. Cobb:

Q. In other words, you do find that these invoices marked here as No. A-7 are duplicates of gasoline that is delivered or had been delivered by delivery receipts at a previous date?

A. No, I don't.

Q. Well, is that because you are unable to tie these particular invoices into some other delivery slip?

A. Well, it is because the only thing that I have here is what appears to be a regular sales invoice, and it is entered on Mr. Lockwood's sales books as such.

Q. All right. Now, you went to his desk and found a stack of delivery slips, as I understand it,

(Testimony of Virgil M. Lyles.)

showing that some transportation company delivered tanks of gasoline to different buyers; is that not right?

A. To a buyer, yes.

Q. And in making your audit you took the amount of gasoline represented by these delivery slips and charged Mr. Lockwood with having delivered that much gasoline; is that right?

A. That is right.

Q. Now then, these delivery slips here, or receipts, when they were turned into the bookkeeping department he posted the \$93 and the amount of gasoline that was represented in the books as having been sold to this particular station, [208] say Al Smith's station; is that right?

A. It is posted in his sales book.

Q. And then you took the amount of gasoline that is posted in his sales book, to wit, the 600 gallons sold to Al Smith, and charged Mr. Lockwood with that gasoline, didn't you?

A. That is true.

Mr. Cobb: That is all.

The Referee: Is that all for this witness?

Mr. Stevens: No, I have another question now.

Redirect Examination

By Mr. Stevens:

Q. Were any of these sales evidenced by the invoices contained in or included in Claimant's Exhibit No. A-7 duplicates of the invoices which you found in the drawer of Mr. Lockwood?

(Testimony of Virgil M. Lyles.)

Mr. Cobb: We object on the ground that calls for a conclusion. He testified what he did. He took the delivery slips of gasoline in this desk drawer and then he charges Mr. Lockwood with that. He takes these invoices represented here, and he charges him with that. Now, the fact that he is not convinced somebody hasn't shown him that the amount of gasoline represented by these are the same as those in the other, why, he says he doesn't recognize it as a duplicate, but that is his conclusion.

The Referee: That is a matter for [309] argument.

Mr. Stevens: Will you read the question?

(Question read.)

The Referee: He has already told us here that these seem to be merely certificates of cash sales. He has already answered already. Isn't that right, Mr. Witness?

The Witness: That is right; and they are not duplicates of the sales which I set up from transportation tickets.

Q. (By Mr. Stevens): As a matter of fact, are they to the same customer as shown by these invoices? A. No.

Q. As the transportation tickets?

A. The customer does not appear in this group of invoices at all.

Mr. Stevens: That is all.

Mr. Cobb: Just a minute. I am sure I don't understand that, the way he comes back again.

(Testimony of Virgil M. Lyles.)

Recross-Examination

By Mr. Cobb:

Q. You went out there and you found that the transportation companies had made out delivery slips of gasoline to stations, didn't you?

A. It appears to me that you are speaking of the six loads of gasoline which I set up as sales to Scotty's Service Stations.

Q. Well, I am talking about your general practice. They have a stack of delivery slips that you used, as I [210] understand, in making your audit?

A. Well, these same slips right here, with the exception of the six to Scotty's Service Stations.

Q. Well, I don't want to confuse you, but you have me confused. Let's try to have an understanding.

In Mr. Lockwood's records there were delivery slips taken by the drivers for gasoline delivered to different customers; is that the way——

A. If they were delivery slips, they were made out on these same forms right here, and bear at least all the earmarks of invoices on the face of them.

Q. Will you listen to the question?

In connection with Mr. Lockwood's operations, his truck drivers would deliver gasoline and would turn in a receipt for the delivery of gasoline; is that right? I am speaking generally. Just forget about this here. Tell us generally if that was the practice they used.

(Testimony of Virgil M. Lyles.)

A. I don't know what his truck drivers turned in.

Q. Well, did you find in the records that you made an audit of delivery slips showing that a certain truck and driver delivered gasoline to a particular station on a particular date?

A. If you are speaking of Mr. Lockwood's own slips, these forms right here—yes, I did.

Q. And you took all of the receipts that showed those deliveries and charged them to Mr. Lockwood as having [211] sold the amount of gasoline evidenced by those delivery slips for the particular month?

A. Except as to those which I believed at the time were duplicates.

Q. Yes. Well, with that qualification, that was what you used; is that right?

A. That is right.

Q. Then you went to the sales book and there you found posted sales to different individuals which are covered by the invoices that constitute Exhibit 7; is that right?

A. That is right.

Q. Then you don't have any knowledge or don't know whether the gasoline that was represented by these delivery slips that were turned in by the truck drivers to a particular station were the same gasoline as covered by these invoices that are receipted as having been paid and which were posted in the books as being paid? You wouldn't know whether—take for example this one on June 25, 1945—somebody collected for 600 gallons of Ethyl gasoline, \$93; is that right?

(Testimony of Virgil M. Lyles.)

A. I don't know whether that is right or whether he sold 600 gallons. Apparently someone collected, because the invoice is marked "Paid."

Q. All right. This is the top one on Exhibit 7, and that was posted to the books on that day of \$93 for 600 gallons of Ethyl gasoline sold to Al Smith; is that right? [212]

A. That is right.

Q. Now, you took and charged 600 gallons to Mr. Lockwood as being sold on that date to Al Smith?

A. Yes.

Q. Now then, a week prior to that there was a delivery slip to Al Smith of 1200 gallons of gasoline, and the delivery slip was there in Mr. Lockwood's records, and you charged him with the deliveries that occurred a week before that of this large delivery; isn't that right?

A. That is right. And his bookkeeper apparently did the same thing during the months represented by those invoices.

Q. Well, that is my point.

No further questions.

The Referee: Any further testimony here?

Redirect Examination

By Mr. Stevens:

Q. Would you explain this last statement of yours——

The Referee: Listen, gentlemen. I thought you were ready for argument. I am going to put this over. I am not going to have you go over and over the same stuff. I will continue it for you, but I am not going to sit here until half past four. How long

(Testimony of Virgil M. Lyles.)

do you think you want to argue this matter? I don't want much argument.

(Discussion off the record.)

The Referee: What is the question you want to put now? [213]

Mr. Stevens: I don't understand this last statement.

Q. (By Mr. Stevens): Is your testimony that you have included the same sale twice in your audit?

Mr. Cobb: That is a different question, and calls for a conclusion, your Honor.

The Referee: There you go now in another long argument. All right, what is your answer, Mr. Witness?

The Witness: My answer is that I did not include these items twice on my audit.

Mr. Pines: I move to strike that on the ground it is a conclusion of the witness. He has already testified to what he did. The Court will decide. He has already testified what he did.

The Referee: It seems to me you get farther and farther away from the true facts.

Mr. Pines: The Court can determine whether or not——

The Referee: I am prepared right now to determine it. I don't want much argument on it, either. I have pretty well made up my mind as to what this is all about.

Well, do you want to talk to me five minutes

apiece, or do you want me to come back here next week and hear you at length?

(Discussion off the record.)

Mr. Cobb: It has been stipulated I might offer this letter next in order, your Honor.

Mr. Stevens: I stipulate it is a correct copy. I assume it is immaterial, however.

The Referee: I don't know what the number is. Apparently the last Debtor's Exhibit was A-3. A-4 for the Debtor.

(Said letter was marked Debtor's Exhibit A-4.)

The Referee: I will hear you very briefly.

Mr. Stevens: Section 7306 of the Revenue and Taxation Code of the State of California defines a distributor as every person who within the meaning of the term distributes as defined in this chapter, distributes motor vehicle fuel, and also includes every person who refines, manufactures, produces, blends or compounds motor vehicle fuel in this State, and every person who imports motor vehicle fuel into this State, or who received in this State motor vehicle fuel of which there has been no prior taxable distribution.

So far as the evidence is concerned, I think it establishes with respect to at least the 792 gallons of kerosene that Mr. Lockwood did blend that, and thus made motor vehicle fuel, and thus is a distributor within the meaning of the Act.

It has also been testified by Mr. Lockwood that he is not licensed as a distributor.

Article IV, Sections 7726 to 7732 of the Revenue and Taxation Code cover unlicensed distributors, and set forth the penalty which shall be imposed upon one who distributes gasoline that isn't tax paid first, fixing the penalty at [215] 100 per cent.

Now, getting back to the actual audit itself, I think it establishes that Mr. Lockwood has made a great number of sales in excess of what his records show that he had received. In that connection I would like to point out that Mr. Lockwood has been given every opportunity, not only by the staff of the State Board of Equalization, but also by the Court in this proceeding, to explain the difference between the total sales, as shown by his books, and his total purchases, as shown by his books, and that he has failed to give any satisfactory explanation of that difference. I would therefore like to rely upon the well-accepted rule that there is a presumption that if evidence is not produced by a litigant which he can produce which would refute evidence showing liability, that such evidence is adverse and would support his adversary.

The Referee: That is a time-honored rule. I read that about 40 years ago, I think. I don't think they have changed it since.

Mr. Stevens: In this case the only person who has any knowlege of where the gasoline was obtained which was sold by Mr. Lockwood and not shown by his records is Mr. Lockwood. He has failed to produce that testimony. Therefore, applying this presumption, it should be presumed that the evidence, if it were produced, would disclose

that it was gasoline which was not tax paid, and therefore Mr. [216] Lockwood has sold gasoline which was not tax paid, and is a distributor, an unlicensed distributor within the meaning of the Act.

In our testimony we have shown that there were possible sources of obtaining tax free gasoline during the period of this audit. We have shown a reason why a distributor of gasoline would not disclose gasoline which was furnished to Black Market operators, because of the fact that he is required to file with the State Board of Equalization, along with his motor vehicle fuel distributor's return a duplicate return for the purpose of passing it on to the OPA after the Board has compared the two. In other words, it would not be practicable for a distributor to pay tax on more gasoline than he actually has coupons to cover, because he gives his duplicate copies to the State Board of Equalization, and he has to have enough coupons to cover the amount of gasoline which he reports to the OPA, so the figures should be identical, and consequently would not report fuel which he has sold if he has not received coupons, and therefore would not be in a position to pay a tax on that additional amount without disclosing that he has sold such an excess of fuel. And so, in so far as the actual attaching of the penalties, the lien provides, and so forth, I merely want to direct the Court's attention to *ex rel Stewart*—

The Referee: I am familiar with that. That is an old classic. [217]

Mr. Stevens: I know you are familiar with it, so I won't take any further time. We rest our case upon the presumption to which I have referred.

The Referee: Mr. Pines?

Mr. Pines: I would like to take just a few minutes of the Court's time in pointing out, although such a presumption might exist between the Board of Equalization and this man, but there is another thing the Board has completely ignored: that the creditors are in a position to urge and insist that no one creditor who is not entitled to take particularly the lion's share of the assets should receive it without at least establishing that that creditor is entitled to it. What I am getting at is, if this litigation were merely between the State Board of Equalization and Mr. Lockwood——

The Referee: He is trying to make an arrangement and pay off his creditors.

Mr. Pines: That is right, with the assets. This man is insolvent. In effect, as a matter of fact, not only is he insolvent, he is hopelessly insolvent. Therefore, the Receiver representing creditors here is here to see to it that no creditor who is not entitled to share in these funds, or who has a fictitious claim is entitled to it. The Board of Equalization will verify the fact that Mr. Lynch as the Receiver opened up the books of the Debtor and lent every possible cooperation. Now, it resolves itself into this. [218] In the early stage of this proceeding, as a matter of fact, the Court will recall that as counsel for the Receiver I conducted some

examinations of Mr. Lockwood myself to determine why these discrepancies in these books existed, and what was the basis for this thing. When we finally reached the point where we thought we understood, we came to the conclusion that there is no tax due and owing to the Board of Equalization, that it was based upon an assumption, and perhaps Mr. Lockwood can't admit it, which I can surmise, but I think I know what the crux of this matter was. I think that there was a juggling of gasoline ration coupons during this period of time. That would not create a tax to the State Board of Equalization. It might subject Mr. Lockwood to certain penalties, and his failure to keep books might also subject him to losing his broker's license. But, your Honor, Section 7354 of the Motor Vehicle Fuel Tax Act—it is a very simple sentence, and it disposes of this whole case—it says:

“The license tax shall be imposed upon only one distribution of the same motor vehicle fuel.”

There can't be two taxes upon the same motor vehicle fuel, and no evidence in this case discloses that there was any motor vehicle fuel involved in which the tax was not paid. There was none whatsoever. I think possibly the Board of Equalization——

The Referee: Apparently these books show an excessive [219] sale.

Mr. Pines: I want to get to that. I think I have indicated to the Court there is no evidence of the physical transfer of gasoline. I have indicated to the Court what my personal opinion of that is, and that is that these duplicate invoices were perhaps

for the purpose of qualifying for additional gasoline coupons, in violation of the orders of OPA, but neither this Board nor anyone else can show that actually there was a distribution of gasoline upon which a tax became assessed.

The Referee: What would be the reasonable inference of a man acquiring a lot of gasoline? He couldn't use it for hair tonic. You know Mr. Pines, I have to take the common sense view.

Mr. Pines: Your Honor, there wasn't any evidence that there was a single gallon of gasoline in Mr. Lockwood's possession in excess of that which he purchased.

The Referee: In his possession?

Mr. Pines: Yes, that is right. Now, you can't sell that which you don't possess physically.

Now, the point I am getting at is, I will state frankly what I believe, and I think the Court probably feels the same way about it, that the reason for the records not being consistent will probably be so that when the F.B.I. or somebody else came along to examine this man's records to see why so many gasoline coupons were handled—I wouldn't [220] be surprised if there was a lot of juggling. Let's concede that for a moment. Does that entitle the Board of Equalization to come in and receive a tax which it is not otherwise entitled to? Is there any law which gives the Board of Equalization the power to collect three cents per gallon on any gasoline which was not distributed?

The Referee: What stymies me is, why did the man put it in his books?

Mr. Pines: I am speculating.

The Referee: Then why did he put it in his books?

Mr. Cobb: It isn't in his books. They found all the delivery slips.

Mr. Pines. Let's assume that this man had reported income for income tax purposes, the bankrupt had reported income for income tax purposes which he had not actually earned. Do you mean that this court would nevertheless approve a claim of the Collector of Internal Revenue and take out of the estate of an insolvent debtor money to pay a fictitious return, even though this man may have had an ulterior motive, perhaps, in reporting that income? Perhaps someone else had earned it, and he was in a lower bracket, and he put it in his return. The Government wouldn't be entitled to that tax, because taxation is a realistic thing. There are innumerable cases in which our United States Supreme Court has held that substance and not form is the basis of tax determination. [221]

Now, we must reach the substance of this transaction. If for any reason or ulterior or selfish motives, or perhaps illegal motives, this debtor had created a situation, and upon the face of it made it appear that he had handled gasoline, more gasoline than he actually did, that does not create the tax.

Now, the Board of Equalization would have to show that there was a distribution of gasoline here upon which the tax was not paid. I speak of distribution, not resale by a broker. A broker doesn't pay any tax.

The Referee: I understand that.

Mr. Pines: A broker doesn't pay any tax. It is always the distributor. This man is only a distributor, even as an unlicensed distributor, if it is assumed he intentionally and knowingly blended—let's assume that he is an unlicensed distributor of that which he blended. Under the circumstances I don't think there is any question about that, that there hasn't been any proof that a taxable transaction has taken place in this instance, and that is the reason why, your Honor, I objected to a lot of the mass of this testimony which had no bearing actually upon the issues here.

Mr. Cobb: Your Honor, I would like to point out this blending we talk about that made him a distributor, there are cases that he was a distributor. It occurred in July. They were down there the same day. He readily admitted he put this in the other. They didn't say, "Take out a [222] distributor's license." He was licensed through an error. They didn't make an assessment here until August 6, 1946, by their own exhibit. They are just now setting for hearing the revocation of his broker's license. They all recognized it was an error, an innocent error. They even went back to the refiners and checked. They told your Honor they had been out in the field watching to see there was no gasoline entered the channels of trade that was not tax paid. Nowhere is there any evidence—we have Mr. Lockwood's testimony that every gallon he bought was from a refiner that was a distributor. His records correspond with the refiners' records. They have checked that. There is nothing wrong there.

He bought it from these people that were distributors, and the tax was paid. The only thing we have is that his records show that he sold or delivered more gasoline than he bought. That is what it boils down to. That does not prove that they are entitled to impose a tax here unless it is shown that he sold the gasoline on which the tax had not been paid for consumption of motor vehicle fuel, and no tax has been collected. In other words, the case they have offered is built up on presumptions, and trying to take advantage of a situation they find when it was an impossible bookkeeping situation.

Now, the penalty for failure to keep proper records is the revocation of a license. They have known this ever since these investigators were down there last July. Now, [223] that doesn't give them the right to impose a 100 per cent penalty and take all the money from this estate; and I will say to your Honor frankly, the evidence shows he doesn't owe this tax. If he does owe it, I have told counsel we will have to file an immediate consent for adjudication. And when this tax is paid, there won't be five per cent for the merchandise suppliers, and the State walks off with all this estate for a failure to keep proper records. That is really what he is charged with here. They haven't shown he sold to John Smith here gasoline that was used in a motor vehicle in excess of what he bought. He would have had to get the gasoline from someone, and don't tell me with the amount that is involved here, they wouldn't have had somebody in jail before now if

there was anybody selling gasoline around this State without collecting the tax on it.

Mr. Stevens: With respect to Mr. Pines' remarks about juggling of the books for the OPA, that is answered by the books themselves. Obviously Mr. Lockwood would not set up more sales than he had purchases in order to cover extra coupons. That just wouldn't satisfy the OPA. So far as the explanation about the fictitious sales invoices to cover just the purchase of ration stamps, I think that is answered by Mr. Lyles' testimony here that he checked their cost, checked those supposed duplicate sales, and found that they were actual bona fide sales, as evidenced by the customers' checks which had been cashed by Mr. Lockwood. [224]

Mr. Cobb: There was only a portion, he said, that he checked.

Mr. Stevens: Well, your Honor knows the evidence so far as the percentages that were checked. They were checked so far as possible. So far as that ration stamp explanation is concerned, I think your Honor will bear in mind that the only explanation that was brought out in that regard was a couple of questions by Mr. Cobb of Mr. Williams when he was on the stand. They didn't elect in their direct examination to make that their explanation, and I don't think that they have the matter properly before your Honor to raise that issue. The fact that we agree that there is the fact established here that he sold more gas than he has bought—we do submit to your Honor that the only possible way to enforce

this tax is, after giving Mr. Lockwood all the possible opportunity to explain where he got the gasoline from, and bearing in mind, too, that in connection with Mr. Cobb's own questioning he brought out from our witnesses the fact that they had checked all of the regular distributors who furnished Mr. Lockwood with gasoline, and didn't find any discrepancy for the amounts reported, shows he must have obtained that gasoline from some other source, and there is no way to show it is a tax-paid source.

Mr. Pines: I think we are left in this anomalous position: The State insists that the creditors of this estate should be penalized because perhaps Mr. Lockwood [225] couldn't afford to take the stand and incriminate himself personally.

The Referee: Mr. Pines, I don't differentiate between creditors. A tax creditor is a creditor the same as anybody else.

Mr. Pines: As a matter of fact, as attorney for the receiver we would be fighting for them if there was any tax, but counsel hasn't shown that one gallon of gasoline was handled where the tax was not paid on it.

The Referee: I am thoroughly satisfied that this man sold lots of gasoline on which he didn't pay any tax, and I will allow this claim as a proper claim. I remember Mr. Williams' testimony here, which wasn't refuted, that he asked Mr. Lockwood about his tickets, and Mr. Lockwood turned to him and said, "If I told you the whole story, it would involve lots of people."

Mr. Pines: That is my point.

The Referee: This is a good, valid tax claim.

Mr. Pines: I believe there is always a difference of opinion, but your Honor is penalizing the creditors of the estate, and penalizing Mr. Lockwood because he has some OPA violations, and making us pay for it.

The Referee: If I can't follow a man's books, what am I going to go on?

Mr. Cobb: Your Honor, there is a 100 per cent penalty. Are we going to argue that? [226]

The Referee: I don't know that.

Mr. Pines: It definitely does state that.

The Referee: Then you will have to eliminate the penalty.

Mr. Pines: To avoid an immediate review, would your Honor make his order without prejudice to a determination of the claim in the event the adjudication in bankruptcy falls, so that this matter may be urged before the Court?

The Referee: No, I am not going to go all over this again.

Mr. Pines: I am trying to conserve the assets of the estate. I am doing this in good faith. It is not sour grapes. It means in this debtor's proceeding it will have to be reviewed.

The Referee: I have been reviewed lots of times. That doesn't scare me a bit.

Mr. Pines: I am not trying to intimidate the Court. You know that. I have practiced before the Court too long. Your Honor, I trust that I have been here before the Court long enough for the Court to know——

The Referee: You have, Mr. Pines; but I have made up my mind.

Mr. Pines: I merely asked the Court to qualify his ruling so we could avoid a review.

The Referee: No, sir.

Mr. Pines: If there are no assest to cover [227] the liabilities——

The Referee: I will make that a definite ruling allowing it as a claim. Review it if you like.

Mr. Stevens: If the Court please, you did mention something about penalties. Will you read this case before you make the order?

The Referee: I will.

Mr. Stevens: Is this a final order, or do you want a formal order prepared?

The Referee: Yes, sir; you will have to have findings of fact and conclusions of law and submit it to these gentlemen for their approval as to [228] form.

Friday, December 20, 1946—10:00 A.M.

Mr. Pines: Your Honor, this motion of mine is directed against the State as well as the Debtor. Mr. Francis Cobb, who represents the Debtor, informed me last night that he had a matter before Referee Brink, a sale, which would be first on the calendar, and said that he would be a few minutes late.

The Referee: Do you want to wait for him?

Mr. Pines: Yes, your Honor, if we may.

The Referee: Have you read Mr. Stevens' order?

Mr. Pines: I was served with a copy of the order

allowing the claim a few minutes ago, the proposed order—if the Court has not already signed it.

The Referee: I have not signed it.

Mr. Pines: I would like the Court to hold it until I go over it. I have been waiting for weeks for these facts, and I think I am entitled to be heard on them.

The Referee: I have not signed it yet. I will be back in a few minutes.

(Short intermission.)

The Referee: All right, what have you to say?

Mr. Pines: Our position is simply this. I know there is a victor and vanquished in a lawsuit, and there is always a disappointment for those who go down.

The Referee: Yes, sir. [229]

Mr. Pines: On the other hand, my approach is a bit different. I think it is more objective. We represent the third parties in this dispute between the State of California and Arlie R. Lockwood, the Debtor in this proceeding. The position we took when this case first started was this, that if Mr. Lockwood owed the tax, it should be paid, but if he didn't owe the tax, obviously we didn't want to pay it. When I say we, I mean the creditors. The objections filed to the allowance of the claim set up that the tax was not owing to the State of California. Now there was nothing in the evidence through all of the lengthy proceedings which we had that was to the contrary. It was undisputed that every bit of gasoline handled had the tax paid

on it. The theory of the State was a rather novel one. That was because there were discrepancies in the reports from the actual amount of gasoline apparently handled, and that therefore since there were those discrepancies that they were permitted to make an arbitrary assessment. Whatever the case might be between the State and the Debtor himself, the Court will readily recognize it would be most inequitable that the creditors would have to pay for Mr. Lockwood's possible machinations of his books, especially if they were not on taxable transactions. As attorney for the Receiver I sat through these proceedings confident that presumption would not be invoked for charging the estate or the third parties with such a tax. The Court of course disagreed as evidenced by the ruling of [230] the Court.

Section 57 of the Bankruptcy Act provides that where a claim is allowed it can at any time thereafter be re-examined by the Court, and quite obviously for equitable reasons the Court should re-examine it. Strangely enough in the enactment of the section, Congress did not provide that where a claim was disallowed it could be re-examined. That is *res adjudicata*. But they recognize a court of bankruptcy is a court of equity, and from time to time different equities may be considered, and that at any time, even after allowance, it may be re-examined and objections heard. Therefore and for that reason the Receiver has moved this morning that we be given an opportunity for reopening and seek further evidence in this matter.

The State will have to admit that they did not introduce proof that there was any taxable evidence here. They hang their hats on the fact that Mr. Lockwood failed to explain why there were discrepancies in his books from the amount of gasoline handled, and in no part of their evidence has it been argued that actually was sold upon which a tax had not been paid, with the exception of some 700 barrels of gasoline which was blended. That does not amount to \$29,000. It amounts to less than \$100 in taxes. It is for that reason at this time the Receiver moves that the Court reopen the proceedings so as to permit us to make an audit and check for further evidence so as to bring the actual [231] facts before the Court.

Just one further thing I want to state, and that is, at the conclusion of the last hearing, the record will show the Court asked the State to prepare findings of fact and submit them to opposing counsel, and then submit them to the Court. That was some three weeks ago. Today we were served with an order allowing the claim, which contains no evidence of fact whatever with the exception of the statement that the objections were not sustained by the proof. That in itself is a dead giveaway, if the Court please. If the State were to try to produce findings of fact that there were any taxable transactions here, it would be an utter impossibility, and we ask the Court to permit us to go still further into the matter to show there was not any tax incurred in this transaction.

Now pardon me just a moment. My motion asks that the——

The Referee: That it be re-examined at the expense of Mr. Lockwood?

Mr. Pines: That is right. I thought Mr. Cobb would agree that the Debtor should pay that. He tells me the Debtor hasn't any money and that whatever money there is is in the possession of the Receiver, which is about \$2,500. Of course, if that is the situation, we have to rely upon the Court indicating to us what portion we may use for such an audit. I feel that even if no audit were made I think [232] the Court should reopen the matter and permit us to bring Mr. Lockwood and other witnesses in and find out about it—assuming there was testimony withheld here, assuming there were evidences of Black Market operations or anything else—I think we ought to find out what actually took place.

The Referee: You had Mr. Lockwood on the stand time and time again.

Mr. Pines: I felt the burden was upon the State.

The Referee: Is he any more disposed now to tell us the facts than he was then?

Mr. Pines: If I can't get it from Mr. Lockwood I will try to get it from other people. I am inclined to believe that I can get it from Mr. Lockwood. Frankly I didn't go too far in that respect for the reason I felt the burden was on the State to prove the claim, but the Court should realize I am conscientious when I say that I didn't think they proved it, and if he had some reason to avoid tes-

tifying, that might incriminate him, it did not affect me particularly, but now that it does affect the pocketbooks of the creditors I don't care whether it incriminates him or not, especially if there is no tax resulting therefrom.

Mr. Stevens: We don't question the Court's right to grant the motion that is being sought here. I don't think Section 57 applies as yet because the formal order of this Court has not been signed.

Mr. Pines: That is true. I am trying to save you [233] that expense.

Mr. Stevens: I may disagree with the construction, but if the order is signed and becomes final, then I think Section 57 probably applies to the type of allowance. Be that as it may, it is not involved in this particular motion at this time.

From what Mr. Pines has said it seems he is laboring under a misapprehension as to the State's position in this case. We do not concede it was proved that all of the gasoline sold by Mr. Lockwood was tax paid because that is the reason we are here. It was because the only gas that Mr. Lockwood could show was tax paid or what he had purchase invoices for——

Mr. Pines: May I interrupt you there so that we are clear on that. Mr. Lockwood testified he handled no gasoline on which tax had not been paid, and you stipulated that if certain witnesses were brought into court they would testify the gasoline handled with them, the tax had all been paid on, and there was no evidence introduced by the State

showing any gasoline handled upon which no tax was paid. Is that right?

Mr. Stevens: No, that is not correct. If you don't mind, I would like to finish my argument.

Mr. Pines: I thought perhaps we would clear that up.

Mr. Stevens: No. So far as the evidence is concerned, the State's position is we have so much gasoline shown to [234] be sold by Mr. Lockwood, and we have that much less gasoline for which he can show it was tax paid by virtue of purchase invoices. We agreed and our witnesses testified and we have checked with the regular suppliers of Mr. Lockwood and found that all of the gasoline they sold him dovetailed with what they reported, but we still had left a large segment of gasoline and we cannot tell whether or not there has been any tax paid. Under the circumstances, after the long hearing we had, it was up to the Receiver and Mr. Lockwood to show that that gasoline was tax paid, and we think the presumption upon which we relied that Mr. Lockwood is the only one who will give us that information, and if he won't give it to us there is only one inference that can be drawn, and it is a presumption in law which is an inference that if Mr. Lockwood gave evidence it would be that the gasoline was not tax paid. That is not an arbitrary presumption at all. It is not one that is inequitable and unjustly enriching the State. It is based on common sense. If a man knows where he got gasoline and that it was tax paid, he would say.

and that burden Mr. Lockwood did not establish in this case.

So far as the other matters are concerned, I think your Honor will agree that the audit made by Mr. Lyles was a very complete one. I have Mr. Lyles here in court if the Referee has any doubt about the completeness of that audit. Mr. Lyles is ready to take the stand and tell you from what books it was made and show that he took everything [235] into consideration that was there at the time of the audit. Frankly I can't see how anything could be gained if there was a reaudit of these records by a C.P.A. So far as Mr. Lockwood is concerned, his own reaction was, "Well, more power to them if they can find out. I certainly couldn't, but if they can, more power to them."

In addition, we do have this change in circumstances which I think would make any reaudit at this time undesirable, and that is that certain of the records of the debtor which were available at the time Mr. Lyles and his staff made their audit are no longer available; they aren't here and we haven't been able to find them. They are not in the Receiver's office. How can we go back and audit records which we cannot find? A good portion of the tax arose from presently unavailable records. I don't see how we can go over that situation.

The third point which I would like to raise is according to the information supplied me, just generally it is true, they did not give me exact figures because no actual appraisal has been made of the assets beyond Mr. Pines and Mr. Cobb advising me

of the value of the assets of the estate being less than the amount of our claim. So that if we do authorize a reaudit it will cost a couple of thousand dollars. Frankly I can't see what would be gained, and in the end we will be reducing our own claim that much. It doesn't seem to me that after an extensive hearing such as [236] we have had in this case—and I would like to point out that we had completed our testimony so far as the State of California's case was concerned, on the 28th of October, and we then had the last date here on the 27th day of November, during which time Mr. Lockwood was going to try to go out and bring in this explanation. I think if the Receiver was going to question this matter he should make his investigation, but he was content to rest his case and submit it for decision. Under the circumstances it doesn't seem quite equitable to open it up. I don't think anything can be gained by it. We would like to oppose the motion.

Mr. Pines: I am rather amazed at a public official taking advantage of a technical situation, that the State of California should make any claim to money unless they are entitled to it.

Mr. Stevens: I think I made my position clear that we do not intend to, Mr. Pines.

Mr. Pines: I interrupted you and I was wrong in so doing. Will you let me finish, please?

Mr. Stevens: I just wanted to get that straight.

The Referre: May I ask this: Is it true, as he says, that certain records are no longer available?

Mr. Pines: It is news to me. That is what I

want to get at. If there are any records missing, why don't we know about them?

The Referee: One factor might influence me. If you [237] were to agree to pay these expenses, that is one thing, but to penalize the taxing authority now and make them pay the expenses of it does not appeal to me.

Mr. Pines: The creditors are actually paying, if the Court please, especially if the State is able to take it on a presumption or inference. Obviously this estate is hopelessly insolvent if the State of California has a lien to the extent of \$29,000. Therefore it is of vital importance that it hang not on a legal technicality, and that the creditors will at least have had an opportunity of getting behind Mr. Lockwood's testimony and finding out whether or not there was a tax paid. Mr. Stevens very baldly admitted a few moments ago that they could not determine whether there was a tax paid or not, not upon transactions, your Honor, but because of certain duplicated invoices and statements. I think I know the reason for those duplicated statements and invoices. It is not fair for the Court to consider it as evidence. I think they were missing so as to cover up illegal gas coupons that were handled.

The Referee: Do you want me to put a stamp of approval on that type of transaction?

Mr. Pines: Definitely not, and if this justifies your reporting it to the United States Attorney's office, that is something else, but that doesn't justify the Court giving the State of California \$29,000

because there is no tax on the handling of Black Market gasoline as such. There is a [238] tax upon every gallon of gasoline upon which tax had not been previously paid.

The Referee: I realize that.

Mr. Pines: Section 7354 says specifically there is a tax on one distribution only, and every subsequent distribution—you can have 39 distributions and there is only one tax. We would like to satisfy the Court on that. If we can't, that is something else again.

The Referee: Mr. Cobb, do you want to say anything?

Mr. Cobb: Not at this time, your Honor.

Mr. Gemmill: Your Honor, I am one of the attorneys for the Elm Oil Company having a claim in excess of \$15,000 in this matter. I have been authorized to speak for the Palomar Refining Company having a claim of approximately \$4,000. That is out of a total of something like approximately \$25,000 in unsecured claims in this case. I think it is pretty obvious to the Court from the statements that have been made here this morning as to the approximate value of the estate and that in actuality this is really a contest between the State of California and the unsecured creditors because obviously if the State's claim is allowed there will be nothing left to unsecured creditors due to the fact that is a preferred claim.

The Referee: That happens pretty nearly every day. They come in and wipe it out. It isn't a novel

situation to me. Taxes are legally imposed, and if they have a lien [239] they clean it out.

Mr. Pines: That is right, but where they cannot prepare findings of fact because there aren't any facts to justify the tax——

The Referee: Oh, we have that happen every day with the Government. If it is a legal obligation and they are entitled to it, they should have it.

Mr. Gemmill: But since this is a question between the State and the unsecured creditors—it is not a question in which inferences such as Mr. Stevens referred to in order to substantiate his claim should be indulged in against the unsecured creditors.

The Referee: Let me ask you, what effort did you or your client make to reveal the true state of facts while these proceedings were in progress? Did you make any effort?

Mr. Gemmill: I wasn't here during the entire proceedings.

The Referee: I saw you once or twice.

Mr. Gemmill: I was here at the first hearing. My client sat through all of the hearings and he was ready to testify to anything he knew about. I understood later his testimony was stipulated and he did not take the stand. He has been at all times ready and he is now ready to testify to anything that had anything to do with the matter.

Now on the subject of the audit and what it might [240] reveal, I understand the question of the actual income and expenditures of this business during the period of operation was something that

was not gone into. I might be mistaken about that, but that is my understanding. I believe at the very least that is something that should be covered by an audit and should be submitted to the Court, because it has a relevant bearing upon the subject. I think that is about all I have to say.

Mr. Cobb: I would like to add this, your Honor. I don't know about this proposed audit, but I think clearly in the first place we are entitled to findings because it was admitted that a portion of these assessments were duplications on certain exhibits that we offered here. Furthermore, I think under the law the claim including 50 per cent penalty is contrary to the Bankruptcy Act and should not be allowed. This was not a case where the assessment had become final before bankruptcy. They filed the assessment and the time to object and ask for a hearing before the Court had not expired, so in my opinion there isn't any justification under the law for allowing a penalty of 50 per cent, especially with the inhibition that is found in the Bankruptcy Act which they are asking in their order today. I mention that before I go into the facts.

I feel like Mr. Pines does, and as your Honor stated at the commencement of the proceedings, that the burden was on the State to prove its claim, and if they had the evidence, [241] that was one thing, but your Honor wasn't going to allow a \$30,000 claim unless there was some evidence. According to the evidence offered they merely found some delivery slips showing deliveries which were not re-

corded in his book, and the total of those deliveries amounted to X gallons of gasoline on which they based their tax. Those delivery slips were explained, how duplicates would arise, because one slip would be made out by a truck driver. Later Mr. Lockwood would go out to collect and take the money and the stamps and turn it over to the bookkeeper, and the additional slip handled by the truck driver was put in this drawer. It was admitted by their investigators that they spent time trying to investigate these deliveries and they could not determine whether they were all right or not. The only thing they based it on was what they found in these delivery slips. Even the evidence they have isn't sufficient to even raise the presumption that there was a delivery of and sale of gasoline or the type of gasoline or whether it was tax paid. In other words, we have a situation where nobody in California can go out and buy gasoline without paying a tax on it, unless they steal it, or as they point out with one or two exceptions, and they admitted they had investigators watching the refineries. They were watching this thing for a long period of time, and we know from a practical standpoint that this gasoline, if he did sell it, as shown in these delivery slips, was tax paid gasoline, otherwise they would [242] have caught up with the source of it. It wasn't just one day; it went over a long period of months. They had a lot of men watching the situation. Undoubtedly it was tax paid gasoline. The amount that these delivery slips show I don't think is sufficient to constitute any

presumption that would impose this liability. I feel it is not a proper claim, that they have not proved their case, that it was based merely upon suspicion and upon records which they say in one breath are not correct, and then they take the records in the other breath to show that he is liable for the amount of delivery. I don't think there has been any proof of sale of any gasoline on which a tax had not been paid.

The Referee: I am satisfied my original ruling was correct. It is for Mr. Lockwood to tell us what the truth was. He sat here day after day and didn't do that. Now then, if creditors have to suffer, that is no reason why I should believe Mr. Lockwood. I don't think he told us any part of the truth at any time.

Mr. Pines: May we have findings of fact?

Mr. Stevens: May I make a statement about the findings in regard to what Mr. Pines has said?

The Referee: I think you had better make them more elaborate than you have here. You have just a blanket statement.

Mr. Stevens: It will be of benefit to me if we could discuss it for a moment. As I understand the issues in this [243] case, they are the objections which have been contained in the objections of the Debtor and the Receiver. Those are the issues of fact.

The Referee: Yes, sir.

Mr. Stevens: I took this particular form from Remington's Form Book. It is one which is acceptable to the bankruptcy profession. The two

forms, one denying the objections and one allowing the objections, both follow the same form.

The Referee: If you are willing to stand on it, I will sign it.

Mr. Pines: Those are orders, but they are not findings. The Court ordered that findings of fact be submitted.

The Referee: Yes, I think you should make them more full.

Mr. Stevens: Then shall I go outside of the objections? That is what I want to know.

The Referee: I would make a finding on every objection.

Mr. Stevens: Very well, sir.

Mr. Cobb: In the Superior Court you have to find the ultimate fact.

The Referee: The forms put in these law books are often times treacherous and lead us into pitfalls.

Mr. Stevens: I will be glad to make a finding on each objection. [244]

The Referee: So I won't sign this order allowing the claim until you get some findings in there.

Mr. Pines: May we be permitted to approve those findings as to form, your Honor?

The Referee: Oh, surely.

Mr. Stevens: You hold them five days after you receive them until you sign them?

The Referee: Yes.

Mr. Pines: I am sure we will have requested findings after it is submitted.

Mr. Cobb: What about the penalties?

The Referee: I don't know, Mr. Cobb. I think they should all go in on the same basis.

Mr. Pines: One more thing. This is a Chapter XI proceeding, and quite obviously I am going to move that the Debtor be adjudicated a bankrupt.

The Referee: I wrote a letter to Mr. Lynch this morning. He told me he could not get in touch with Mr. Lockwood to make certain reports. Mr. Lockwood apparently is not cooperating with Mr. Lynch. That is what Mr. Lynch told me. I don't know. I get complaints from different people. He says he can't find him, that he is always some other place. It would be advisable, I think, for Mr. Lockwood to let Mr. Lynch, the Receiver, know where he can get in touch with him. I don't know whether this is true or not. I am just quoting Mr. [245] Lynch.

Mr. Pines: Irrespective of whether or not the claim is sustained or allowed later on, it is obvious with the present order allowing the claim that it will have to be adjudicated because a plan of arrangement could not possibly be consummated. I think perhaps Mr. Cobb might stipulate to that.

Mr. Cobb: We can probably save you some time in that connection.

Mr. Pines: I think Mr. Cobb can probably stipulate.

The Referee: I think you had better send up a written order of consent.

Mr. Cobb: I think that would be the better way to do it.

The Referee: Then we will have something in the record.

Mr. Pines: That is a better way to do it.

The Referee: All right, gentlemen. [246]

State of California,
County of Los Angeles—ss.

I, Byron Oyler, Official Court Reporter for the Honorable Hugh L. Dickson, Referee in Bankruptcy, do hereby certify that the foregoing 246 pages comprise a true and correct transcript of my shorthand notes of the testimony given in the above-entitled matter.

Dated this 6th day of October, 1949.

/s/ BYRON OYLER,
Official Court Reporter.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 114, inclusive, contain the original Referee's Certificate on Review; Proof of Priority Claim for Taxes; Notice of Hearing on Objection to Claim; Objection to Claim of Controller of the State of California; Amended Proof of Priority Claim for Taxes; Objection to Amended Claim of Controller of the State of California;

Order Allowing Claim after Hearing Objections Thereto; Petition for Instructions; Order on Receiver's Petition for Instructions; Petition for Review of Referee's Order Allowing Claim After Hearing Objections Thereto; Petition for Order to Show Cause; Order to Show Cause; Affidavit of Service by Mail; Order re Omission of Narrative Statement of Evidence and Reporter's Transcript from Referee's Certificate on Review; Referee's Supplementary Certificate on Review; Nunc Pro Tunc Order Amending Order Allowing Claim After Hearing Objections Thereto; Findings of Fact and Conclusions of Law Re Claim of the Controller of the State of California; Points and Authorities of Receiver and Debtor (Separate) on Review; Notice of Motion; Points and Authorities; Notice of Motion for Order to Permit Addition of Reporter's Transcript to Record on Review with Points and Authorities and Affidavit in Support; Memorandum on Review; Findings of Fact and Judgment on Petition for Review and Order Thereon; Notice of Appeal; Undertaking for Costs on Appeal and Designation of Record on Appeal and full, true and correct copies of Debtor's Petition Under Chapter XI of the Bankruptcy Act; Approval of Debtor's Petition and Order of Reference and Minute Order Entered February 28, 1949, which, together with the original Reporter's Transcript of Proceedings before the Referee on Hearing on Objections of Debtor and Receiver to Claim of the Controller of the State of California, etc., on October 22 and 28, November 1 and 27, 1946, transmitted

herewith, constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$3.75 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 20 day of December, A.D. 1950.

[Seal]

EDMUND L. SMITH,
Clerk.

By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 12782. United States Court of Appeals for the Ninth Circuit. Controller of the State of California, Appellant, vs. Arlie R. Lockwood, Bankrupt, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed December 22, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12782

CONTROLLER OF THE STATE OF CALI-
FORNIA,

Appellant,

vs.

ARLIE R. LOCKWOOD, Bankrupt,

Appellee.

STATEMENT OF POINTS UPON WHICH
APPELLANT INTENDS TO RELY

Appellant, Controller of the State of California,
intends to rely on appeal on the following points:

1. The Honorable Harry C. Westover, District Judge, erred in holding that the record herein does not support the findings made by the Referee.

2. The Honorable Harry C. Westover, District Judge, erred in setting aside and vacating the Findings of Fact, Conclusions of Law and Order of the Referee allowing in full the tax claim of appellant in the sum of \$31,160.31 plus interest in the sum of \$71.42 per month or fraction thereof after December 31, 1946, to date of payment.

3. The Findings of Fact, Conclusions of Law and Order made by the Honorable Harry C. West-

over, District Judge, are not supported by the record herein.

4. The Honorable Harry C. Westover, District Judge, failed to apply the laws of the State of California in considering the validity of the tax claim allowed by the Referee.

5. The District Court erred in permitting others than the bankrupt (formerly the debtor) to review the Referee's Order allowing appellant's tax claim, as set forth above, despite the fact that only the bankrupt had petitioned for review of the Referee's Order.

6. The District Court erred in permitting parties not petitioning for review of the aforesaid Referee's Order to participate therein by furnishing and paying for a reporter's transcript of the proceedings before the Referee, overlooking the fact that pending before the District Court was Mr. Lockwood's Petition for Review and not a Petition for Review filed by the trustee of Mr. Lockwood's estate or by any other creditor thereof. Reference to the record herein will disclose that the Referee duly made an Order on January 21, 1947, directing the trustee herein, who, at the time, was acting as receiver under Chapter XI, not to file a Petition for Review.

7. The Honorable Harry C. Westover, District

Judge, erred in failing to affirm the Order of the Referee allowing the claim of appellant in full.

Dated: December 28, 1950.

FRED N. HOWSER,

Attorney General,

JAMES E. SABINE,

Deputy Attorney General,

/s/ EDWARD SUMNER,

Deputy Attorney General,

Attorneys for Controller of the State of California.

Affidavits of Service by Mail Attached.

[Endorsed]: Filed December 29, 1950.

[Title of Court of Appeals and Cause.]

APPELLANT'S DESIGNATION OF RECORD
TO BE PRINTED

Appellant, Controller of the State of California, claimant, hereby designates the entire record and all of the proceedings and evidence certified to the Clerk of this Court by the Clerk of the District Court in connection with the within appeal as material to the consideration of the appeal and appellant hereby requests that the entire record and all of the proceedings and evidence be printed.

Dated: December 28, 1950.

FRED N. HOWSER,
Attorney General,

JAMES E. SABINE,
Deputy Attorney General,

/s/ EDWARD SUMNER,
Deputy Attorney General,

Attorneys for Controller of the State of California.

Affidavits of Service by Mail Attached.

[Endorsed]: Filed December 29, 1950.